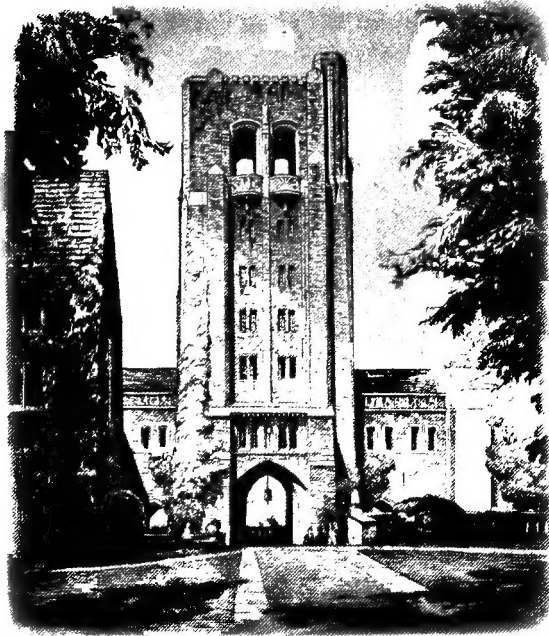




Cornell Law School Library

Marshall Equity Collection

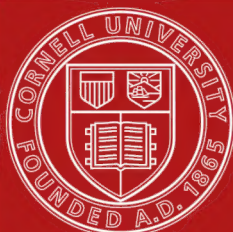
Gift of

E. J. Marshall, L. L. B. 1894

CORNELL UNIVERSITY LIBRARY



3 1924 085 501 173



Cornell University Library

The original of this book is in
the Cornell University Library.

There are no known copyright restrictions in
the United States on the use of the text.

PUTERBAUGH'S
MICHIGAN
CHANCERY PLEADING AND PRACTICE.

A PRACTICAL TREATISE

ON THE FORMS OF CHANCERY SUITS, PLEADINGS AND PRACTICE, NOW IN USE
IN THE STATE OF MICHIGAN, WITH FORMS OF BILLS, PETITIONS,
ANSWERS, PLEAS, DEMURRERS, EXCEPTIONS, MOTIONS,
AFFIDAVITS, NOTICES, ORDERS, DECREES, ETC.

—AND—

PRACTICE IN THE SUPREME COURT.

—BY—

SABIN D. PUTERBAUGH,

Late one of the Circuit Judges of Illinois, Author of Puterbaugh's Common Law
Pleadings and Practice, and Puterbaugh's Chancery
Pleadings and Practice.

REVISED BY LESLIE D. PUTERBAUGH,

One of the Circuit Judges of Illinois.

THIRD EDITION.

CHICAGO:
CALLAGHAN & COMPANY.
1898.

B63709

Entered according to act of Congress, in the year 1882,
By SABIN D. PUTERBAUGH,
In the office of the Librarian of Congress, at Washington, D. C.

Entered according to act of Congress, in the year 1890,
By SABIN D. PUTERBAUGH,
In the office of the Librarian of Congress, at Washington, D. C.

Entered according to act of Congress, in the year 1898,
By ANNA E. PUTERBAUGH,
In the office of the Librarian of Congress, at Washington, D. C.

Stereotyped and Printed
by the
Chicago Legal News Company.

INTRODUCTION TO THE THIRD EDITION.

The object of this work is to present in one volume, of convenient size, a practical treatise on Pleadings and Practice in Suits in Chancery, and proceedings of like nature, and to suggest forms of pleadings, and other papers, decrees and orders necessary in the preparation and conducting of proceedings in chancery.

Puterbaugh's Chancery Pleadings and Practice was originally prepared to more especially meet the wants of the practice in Illinois, and was first published in 1874. It is now in the fourth edition.

In 1881-2 the revision and change of the work, to specially adapt it to the practice in chancery in the State of Michigan, was frequently suggested and encouraged by leading jurists and members of the profession in the State; and the author, induced thereby, with local assistance, prepared and published the first edition of this work.

Since the publication of the second edition in 1890, the Chancery and Supreme Court Rules have been modified and amended in many respects and additional rules established. Thirty-three new volumes have been added to the Supreme Court Reports and a number of public laws pertaining to the chancery practice enacted, all of which rendered a thorough revision of the work necessary.

In the present edition many of the chapters have been entirely re-written and the forms altered so as to conform to the practice as laid down by the latest Chancery and Supreme Court Rules.

References are made to the latest Statutes, including the public acts of 1897, and the decisions of the Supreme Court of Michigan down to and including the 108th volume of the Reports thereof.

It is hoped that this edition will prove acceptable to the bar of the State, and meet with the same impartial favor as that heretofore extended to the several works of the author.

PEORIA, ILL., August 1, 1898.

LESLIE D. PUTERBAUGH.

ANALYSIS OF CONTENTS.

CHAPTER I.

MICHIGAN COURTS OF CHANCERY.....	1
HOW ESTABLISHED.....	1
POWERS AND JURISDICTION.....	1
PRACTICE.....	2
CHANCERY RULES.....	2

CHAPTER II.

GENERAL PRINCIPLES OF EQUITY PLEADING.....	4
--	---

CHAPTER III.

COMMENCEMENT OF A SUIT IN CHANCERY.....	5
Section 1. HOW COMMENCED.....	5
By bill—By information.	
2. WHERE COMMENCED.....	6
3. SECURITY FOR COSTS.....	8
When required—Form of bond for costs.	

CHAPTER IV.

BILLS IN CHANCERY.....	10
Section 1. DIVISION OF BILLS.....	10
2. CONSTITUENT PARTS OF AN ORIGINAL BILL.....	11
3. THE ADDRESS.....	12
4. THE INTRODUCTION.....	12
5. THE PREMISES OR STATING PART.....	13
Certainty required—Exhibits—The bill must state the whole subject, and not too many subjects—Matters in litigation not divisible—Multifariousness—Scandal and impertinence.	
6. CONFEDERATING PART.....	24
7. CHARGING PART.....	24
8. JURISDICTIONAL CLAUSE.....	25
9. INTERROGATING PART.....	25

10.	PRAYER FOR RELIEF.....	26
11.	PRAYER FOR PROCESS	28
12.	FRAME OF BILL.....	29
13.	SIGNING OF BILL.....	29
14.	SWEARING TO THE BILL.....	30
15.	PARTIES TO BILLS.....	31
	Who should be made parties—How described—Persons under disability—Interest of parties—Want of proper parties—Misjoinder of parties—Joinder of parties.	

CHAPTER V.

FORMS OF CONSTITUENT PARTS OF ORIGINAL BILL.....		37
Section 1.	THE ADDRESS.....	37
	In the Circuit Court of the United States—In Michigan.	
2.	THE INTRODUCTION.....	37
	By a complainant, under no disabilities—By an unmarried woman—By a married woman against her husband or other person—By husband and wife—By an infant by his father or next friend—By an infant by his guardian—By a corporation—In the Circuit Court of the United States.	
3.	THE PREMISES OR STATING PART.....	38
4.	THE CONFEDERATING PART.....	38
5.	CHARGING PART.....	38
6.	JURISDICTIONAL CLAUSE.....	38
7.	INTERROGATING PART.....	39
8.	PRAYER FOR RELIEF.....	39
9.	PRAYER FOR PROCESS.....	39
	For <i>subpœna</i> —For injunction.	
	OATH TO BILL OR PETITION.....	40

CHAPTER VI.

PROCESS FOR APPEARANCE.....	41
Section 1. SUBPŒNA.....	41
	Form of.
2. SERVICE AND RETURN OF SUBPŒNA.....	43
	Form of return—Form of affidavit of service.
3. NOTICE BY PUBLICATION.....	46
	Essentials of affidavit—Publication and proof of same— Form of affidavit for order of appearance—Form of affidavits for publication—Form of order for appear- ance—Same, short form.
4. SERVICE BY COPY OF ORDER OF APPEARANCE.....	51
	Form of proof of service of order.
5. ACCEPTANCE OF SERVICE.....	52
6. ATTACHMENT.....	52

CHAPTER VII.

TAKING BILLS AS CONFESSED.....	54
Section 1. PROCEEDINGS FOLLOWING SERVICE OF SUBPOENA.....	54
Form of notice of appearance.	
2. DEFAULT.....	55
Of complainant—Affidavit of failure of complainant to serve copy of bill—Of defendant—Form of affidavit of non-appearance—On default—Of regularity—Order <i>pro confesso</i> and reference—Commissioner's report <i>pro confesso</i> —Effect of default—Where service by publication—Where service is personal.	
3. RIGHT OF DEFENDANT AFTER DEFAULT.....	59
4. SETTING ASIDE DEFAULT.....	60
Form of affidavit in support of motion—Form of order setting aside default.	
5. SETTING ASIDE DECREE WHEN DEFENDANT IS NOT PERSONALLY NOTIFIED.....	62

CHAPTER VIII.

THE DEFENSE TO A SUIT.....	66
Section 1. THE DIFFERENT SORTS OF DEFENSES.....	66
2. DEMURRER TO THE BILL.....	67
Its nature and uses—When a demurrer will lie—General demurrer—Special demurrer—Joint demurrer—Michigan rule—Frame of general demurrer—Form of certificate of counsel—Several causes of demurrer—Separate demurrers—Speaking demurrer—Demurrer <i>ore tenus</i> —Joint demurrer—Demurrer coupled with answer—Demurrer to plea or answer—When to be filed—Joinder in demurrer—Hearing upon—Effect of sustaining or overruling—When amendment allowed without costs—Form of, for multifariousness—Form of, for want of parties—Form of, for want of privity—Form of, to bill of discovery—Form of, to bill when complainant has no interest—Form of, to a part of bill—Same with answer to residue.	
3. PLEA TO A BILL.....	80
Nature of—When proper—To the jurisdiction of the court—To the person—To the bill—Pleas in bar.	
Frame of—Form of certificate of counsel that plea is well founded—Form of affidavit of defendant that plea is not interposed for delay, etc.—Forms of, to whole bill—Same to a part—Same in abatement to the jurisdiction of the court—Same of coverture of the complainant—Same of infancy without a <i>prochien ami</i> —Same that the defendant never was administrator as alleged—	

Same that complainant is an alien enemy—Same want proper parties—Same former adjudication—Same order of reference of plea—Same former suit pending—Same statute of limitations—Same of a release, with answer in support thereof—Same of stated account—Same to part, and answer to the residue of bill—Signing of plea—When to be filed—Replication to—Amendment of bill after plea—Demurrer to plea not proper—Argument of plea—Dismissal of bill—Default of defendant in answering—Effect of allowing the plea—Effect of finding on facts stated in plea—Saving the benefit of a plea to the hearing—Allowing plea to stand for answer—When plea must be supported by answer.

4. ANSWER TO A BILL..... 100

Nature of—Exceptions to answer—Fraud, how alleged—Mode of answering—Affirmative relief on answer—Frame of answer must be paragraphed—What answer should contain—Answers may be joined—Signing of answer—Swearing to—Before whom may be sworn to—Waiver of oath—Effect of sworn answer—When evidence against a co-defendant—Answer of deceased ancestor as evidence—Admissions in answer—Answer of a corporation—Answer of infant and insane defendants—Form of answer—Title of answer by one defendant—Same of joint and several—Same by one of several—Same to amended bill—Same where exceptions have been taken to a form of answer, and the bill has also been amended—Same to supplemental bill.

Same to amended answer—Same by infants by their guardian *ad litem*—Forms of commencement—Same introduction by one defendant—Same of several defendants—Common forms in framing answers—Same where defendant admits a statement—Of written instruments—Same where defendant believes a statement may be true, but qualifies his admission of it, not knowing the same of his own knowledge—Same where defendant is entirely ignorant with regard to the statement in the bill—Same where one of two defendants, of his own knowledge, knows the statement of the bill to be true, and the other defendant does not know the same, but believes the answer of his co-defendant—Same where one of two defendants denies the allegation of the bill, and the other defendant believes such denial to be true—When several defendants join and are all ignorant—Form of a general frame of an answer—Same affidavit to answer—Same short form of answer—Same of infants by their guardian *ad litem*—Same statement in answer, claiming the benefit of the statute of frauds—Same conclusion of an answer, insisting that the complainant has an adequate remedy

- at law—When to be filed—Dismissal of bill—Amendment to answer—Answer to amended bill.
5. DISCLAIMER..... 118
Nature of—Form of—Same of answer and disclaimer.
6. ANSWERS IN THE NATURE OF CROSS-BILL..... 121
Affirmative relief on answer—When must be sworn to—Defense—Frame of—Form of answer to bill of foreclosure praying affirmative relief.

CHAPTER IX.

- AMENDMENTS TO BILLS..... 125
Without leave of court—When to be made—When will not be allowed—Effect of after plea—Form of petition for leave to amend bill after replication—Form of order for leave to amend bill after a general demurrer—Form of amendment to bill.

CHAPTER X.

- REPLICATION.
Nature of..... 132
Within what time to be filed—Issue made—Effect of filing—Withdrawing—Special replication—When cause is at issue—General form of.

CHAPTER XI.

- CIRCUIT COURT COMMISSIONERS..... 135
- Section 1. POWERS OF..... 135
2. WHEN ANOTHER MAY ACT..... 137
3. PROCEEDINGS BEFORE..... 137
Testimony taken by—Time in which to be taken—Fees—By whom paid—Default—Time for returning—Notice for hearing—Process of *subpcna*—Form of notice to commissioner of order closing proofs—Notice to solicitor of order closing proofs—Notice of examination of witnesses—Extension of time—Order enlarging time to take proofs—Proceedings—Form of caption—Commissioner to act as master—Opening case for further proceedings—Taking accounts.
4. REPORT OF COMMISSIONER AND PROCEEDINGS THEREON..... 146
Confirmation—Exceptions—Forms of order of reference to—Form of report of—Form of objections to—Form of exceptions to.
5. APPEAL FROM ORDER OF COMMISSIONER..... 150

CHAPTER XII.

TESTIMONY	151
Section 1. TESTIMONY TAKEN IN OPEN COURT	151
Settling case.	
2. DEPOSITIONS OF NON-RESIDENT WITNESSES.....	155
Before whom may be taken—Notice to be given—When may be taken under commission—Written interroga- tories—Witness may be compelled to appear and testify —Testimony may be written or taken stenographically —Witness may be examined orally—Witness shall be sworn—By stipulation—Power of court to regulate use —How transmitted—Objections to—Attendance of wit- nesses may be compelled—May be used by either party —To perpetuate testimony—Form of notice to take deposition—Form of petition to register that commis- sion issue—Form of notice and interrogatories for tak- ing deposition—Form of notice of application for commission—Form of commission.	
3. PROVING DOCUMENTS AT HEARING.....	162
4. PRODUCTION OF BOOKS AND PAPERS.....	163
Form of notice to produce instrument at trial—Prior to hearing—Portions may be sealed up—Documents in hands of third person.	

CHAPTER XIII.

FEIGNED ISSUES—TRIAL BY JURY.....	166
Nature of—Form of order directing an issue of fact to be tried by a jury—Drawing up and settling a feigned issue.	

CHAPTER XIV.

HEARING.....	170
Notice of hearing—How calendar to be made up— Form of—Notice of issue—Form of notice—Course of proceedings—Hearing case out of its order—Original and cross-bill heard together—Effect of former orders on the hearing.	

CHAPTER XV.

DECREES AND DECRETAL ORDERS.....	175
Section 1. NATURE, USES AND KIND OF DECREES.....	175
Interlocutory decree—Final decree.	
2. FORMS OF DECREES.....	178
Constituent parts—The caption and title—Form of decree	

or order in Circuit Court—Same of caption of order by commissioner—The recitals—Form of recital of a decree or order—The ordering part—Declaratory part—Decree by consent—*Nunc pro tunc* clause—Form of—Drawing of decree—Common and special orders—General form of an order—Same of a decree—Money decrees—Enrollment of decree.

CHAPTER XVI.

MOTIONS AND AFFIDAVITS.....	186
Section 1. MOTIONS.....	186
Notice—When argued—Stay of proceedings—Motion for continuance—Form of notice of special motion—Motion or petition for rehearing.	
2. SERVICE OF PAPERS.....	190
How served—By mail—Where several defendants or solicitors—On party prosecuting or defending in person—In exceptional cases—When service required—How time computed.	
3. AFFIDAVITS.....	192
Forms of jurats—How authenticated—Formal requisites—Affidavit should state facts positively.	

CHAPTER XVII.

SUPPLEMENTAL BILL.....	195
Section 1. NATURE OF, AND WHEN PROPER.....	195
2. WHEN TO BE FILED.....	197
3. PARTIES TO.....	197
4. FORM OF.....	198
Michigan practice—Prayer of—Form of for specific performance, stating that defendant has brought ejectment, praying for injunction, etc.—Same against the assignee of a bankrupt.	
5. PETITION FOR LEAVE TO FILE.....	201
Form of.	
6. PROCESS, ETC.....	202
7. DEFENSES TO.....	202
Demurrer—Form of—Plea—Practice upon demurrers and pleas—Form of plea to—Answer.	
8. REPLICATION AND EVIDENCE.....	205
Replication—Evidence.	
9. HEARING.....	206
Entitling orders—Dismissing bill.	

CHAPTER XVIII.

BILLS IN THE NATURE OF SUPPLEMENTAL BILLS.....	207
--	-----

Section 1.	ORIGINAL BILLS IN THE NATURE OF.....	207
	When proper—Form of—Proceedings upon.	
2.	BILLS TO CARRY DECREES INTO EXECUTION.....	211
	Nature of—Form of.	

CHAPTER XIX.

BILLS OF REVIVOR.....	214
Section 1.	NATURE OF..... 214
	Before decree—After decree—Statute—Frame of bill— Michigan practice—Forms of bills—Order for.
2.	ASSIGNMENT OF SUBJECT-MATTER OF SUIT..... 219
	Form of petition for substitution—Order for substitution.
3.	BILLS IN THE NATURE OF..... 221
	Parties to—Frame of bill—Defenses to—Form of bill,

CHAPTER XX.

BILLS OF REVIVOR AND SUPPLEMENT.....	226
	Nature of, and when proper—Practice upon—Form of.

CHAPTER XXI.

BILLS OF REVIEW.....	229
Section 1.	NATURE OF, AND WHEN PROPER..... 229
	Where it lies—For an error of law—Newly-discovered evidence.
2.	PARTIES TO..... 235
3.	LEAVE TO FILE..... 235
	Performance of decree—Petition for—Form of petition for leave to file a bill of review for errors of law—Same upon newly-discovered evidence.
4.	WITHIN WHAT TIME TO BE BROUGHT..... 239
	Form of order to file a bill of review.
5.	FRAME OF BILL..... 240
	Form of, upon errors of law—Same, upon newly-discovered evidence—Same, affidavit to bill—Binding effect of decree—Amendments to bill.
6.	DEFENSES TO..... 244
	Plea—Demurrer—Answer—Form of plea—Same of de- murrer—In what court brought,

CHAPTER XXII.

BILLS OF DISCOVERY.....	249
-------------------------	-----

CHAPTER XXIII.

BILLS OF INTERPLEADER.....	251
Section 1. NATURE OF, AND WHEN PROPER.....	251
2. FRAME OF BILL.....	255
Form of bill—Affidavit of non-collusion—Same, affidavit annexed to.	
3. DEFENSES TO.....	
Demurrer—Form of, for want of affidavit of non-collusion—Same for not showing any claim of right in defendant—Same for not showing any right in complainant to compel defendants to interplead—Answer—Injunction, etc.—Form of order for injunction on bill of interpleader—Taking bill as confessed—Evidence.	
5. HEARING AND DECREE.....	261
Costs—Form of interlocutory decree directing a reference.	

CHAPTER XXIV.

BILLS AND PETITIONS TO PERPETUATE TESTIMONY.....	265
Section 1. NATURE OF PROCEEDING.....	265
2. FRAME OF BILL.....	265
Form of—Same of affidavit to be attached.	
3. DEFENSES AND PROCEEDINGS.....	269
Demurrer—Answer.	
4. PROCEEDINGS UNDER THE STATUTE.....	270

CHAPTER XXV.

CROSS-BILLS.....	271
Section 1. NATURE OF A CROSS-BILL.....	271
Answer in nature of cross-bill.	
2. FRAME OF BILL.....	274
Form of a cross-bill to a foreclosure suit—Same in the nature of a plea <i>puis darrien</i> continuance.	
3. WHEN TO BE FILED.....	278
Leave to file.	
4. PROCESS UPON.....	279
5. DEFENSES TO.....	280
Demurrer—Pleas—Answer.	
6. PROCEEDINGS UPON.....	282

CHAPTER XXVI.

BILLS FOR SPECIFIC PERFORMANCE.....	284
Section 1. NATURE OF, AND WHEN PROPER.....	284
Requisites of contract—Discretionary with court—When	

will be enforced—Contracts relating to personalty and personal services—Lost instrument—Of an award—Mining contracts—Parol contracts—*Laches*—Delay in performance—Vendor against purchaser—As to lands out of State.

2. PARTIES TO.....	295
3. FRAME OF BILL.....	296
Tender—Form of bill upon a written contract, by vendee <i>v.</i> vendor—Same by vendor <i>v.</i> vendee—Same on a bond for a deed, vendee <i>v.</i> legal representatives of vendor—Same by lessee <i>v.</i> lessor of a written agreement for a lease of a house.	
4. DECREE.....	302
Declaration of right to specific performance—Reference of title—Payment of purchase money and execution of conveyance—Dower rights—Delivery of deeds, etc.—Form of decretal order for a reference as to the title of a vendor, etc.—Same of an interlocutory decree for an account—Same of a final decree for a specific performance of an agreement—Decree—How enforced.	

CHAPTER XXVII.

BILLS RELATING TO PARTNERSHIP MATTERS.....	307
Section 1. WHERE A DISSOLUTION WILL BE DECREED.....	307
2. ACCOUNT BETWEEN PARTNERS.....	309
Limitations.	
3. APPOINTMENT OF A RECEIVER.....	311
When appointed.	
4. FORMS OF BILLS.....	312
Form of a bill for a dissolution, and for an injunction—Same of affidavit to bill—Same of bill for an account of partnership dealings, and an injunction, etc.	
5. FORMS OF DECREES AND ORDERS.....	316
Form of order appointing a receiver in a suit between partners—Same, decree for an account of partnership dealings—Same of a final decree for a dissolution, and for an account.	

CHAPTER XXVIII.

BILLS TO REDEEM.....	318
Section 1. NATURE OF.....	318
Deed absolute on its face when deemed as a mortgage.	
2. WHO MAY REDEEM.....	321
3. WITHIN WHAT TIME TO BE FILED.....	322
4. PARTIES TO.....	323
Complainants—Defendants.	

5. TERMS OF REDEMPTION.....	326
6. FRAME OF BILL.....	328
Form of bill by heirs-at-law of mortgagor v. mortgagee to redeem—Same from a deed absolute on its face, but which was intended as a mortgage—Same to redeem goods which were deposited as a security for money lent—Same to set aside a decree of foreclosure, etc., by heirs of mortgagor v. mortgagee.	
7. DECREE.....	335
Michigan practice—Form of, for redemption.	

CHAPTER XXIX.

BILLS TO FORECLOSE MORTGAGES.....	337
Section 1. GENERAL NATURE OF.....	337
2. WHEN PROPER.....	333
3. PARTIES.....	341
Complainants—Defendants.	
DEEDS IN NATURE OF MORTGAGE.....	346
4. FRAME OF BILL.....	348
Proceedings at law—Forms of.	
5. PRACTICE ON FORECLOSURE BILLS.....	359
<i>Lis pendens</i> —Form of notice <i>lis pendens</i> in foreclosure suit—Reference to compute amount due—Form of order <i>pro confesso</i> , and reference, payments all due—Affidavit of regularity—Proceedings before commissioners—Hearing.	
6. DEFENSES TO.....	363
Defense as against assignee—Limitations— <i>Laches</i> .	
7. DECREE AND SALE.....	365
Personal decree—Form of decree of foreclosure and sale, <i>pro confesso</i> —Sale of mortgaged premises—Deed on sale—Notice of sale—Adjournment of sale—Form of notice of chancery sale—Sale by parcels—Enrollment of decrees, etc.—Form of certificate of enrollment—Report and confirmation of sale—Form of commissioner's report of sale—Same of order confirming sale—Same of affidavit of posting notices—Same of commissioner's deed—Re-opening sale, and re-sale—Writ of assistance—How same is obtained.	
8. SURPLUS AND DEFICIENCY.....	380
Proceeds of sale, when brought into court—How disposed of—Dower in surplus—Deficiency on foreclosure—Liability of third parties—Execution for deficiency—How to obtain execution for deficiency—Answer to application.	
9. INSTALLMENTS DUE, PROCEEDINGS ON.....	384
When bill dismissed—When proceedings to be stayed—Reference in certain cases—Default subsequent to	

- decree—Premises, when entire sold—Application of proceeds, when all sold.
10. STRICT FORECLOSURE..... 386
When allowable—Decree of—Forms of—Bills and decrees.

CHAPTER XXX.

CREDITOR'S BILL.....	390
Section 1. WHEN IT MAY BE FILED.....	390
When proper—Justice's judgment—In U. S. court—In aid of execution—Equitable assets—Trust funds.	
2. WHAT MAY BE REACHED BY.....	397
3. PARTIES TO THE BILL.....	399
Complainants—Defendants.	
4. PRIORITY AND LIEN OF BILLS.....	401
5. FRAME OF BILL.....	403
Bill in aid of execution—What bill should state—Prayer—Verification—Amendment of bills—Swearing to Amendments—Proceedings—Defendant required to answer.	
6. RECEIVERS IN CREDITOR'S SUITS.....	406
Their powers—Receivers for several suits—Security for—How to pay over money—Receivers of subsequent suits—Receivers' accounts—Effect of injunctions—Form of creditor's bill—Same of bill in aid of an execution to remove a fraudulent conveyance—Same against executrix of deceased debtor—Same of an order of reference to master, to examine defendant as a witness—Same that complainant's debt be paid out of funds in the hands of the receiver—Same, setting aside a fraudulent conveyance in aid of an execution.	

CHAPTER XXXI.

PARTITION SUITS.....	422
Section 1. NATURE OF, AND HOW INSTITUTED.....	422
When may be maintained—Partition of personal property.	
2. PARTIES TO.....	425
Complainants—Defendants—Unknown defendants—Guardian for minors—Bond required.	
3. BILL, ETC.....	429
What to set forth—Answer—Feigned issue—Amendment of bill—Form of bill for partition between two heirs, subject to widow's dower—Same—Same and dower.	

4. REFERENCE AND PROCEEDINGS.....	435
Reference on bill confessed—Same to ascertain situa- tion of premises—Infant defendants.	
5. PROCEEDINGS TO DECREE.....	436
Appointment of commissioners—Vacancies—Oath to commissioners—Partition, how made—Report of com- missioners—Fees—Report set aside—Confirmation— Persons not affected—Partition among heirs— <i>Parti- tion by sale</i> —When court to order sale—Order direct- ing terms of credit—Separate securities—To whom delivered—Certain moneys to be brought into court— Application for moneys—Proceedings thereon—Distri- bution—Discharge of incumbrances—Sale of dower or life estate—How proceeds to be invested determined— Sale, and how conducted—Report of sale—Convey- ances—Costs—Distribution of proceeds—Shares of in- fants—Of unknown and absent owners—Of tenants in dower or for life—Security to refund—Security, how taken—Money applied and invested—Suit on securities.	
PARTITION OF LANDS OF INFANTS AND LUNATICS.....	446
Of infants—Of lunatics.	
6. HEARING AND DECREE.....	447
Hearing—Decree—Owerty—Costs—Receiver—Appeal— Voluntary partition—Incumbrances—Improvements —Rents and profits—Opening decree—Form of decree for partition—Same of report of commissioners mak- ing partitions, etc.—Form of oath of commissioners —Same of report of same that premises are not sus- ceptible of division—Form of decree confirming report of commissioners—Same for sale of premises—Same, confirming sale.	

CHAPTER XXXII.

BILL TO PROBATE FOREIGN WILL.....	456
Section 1. WHEN ALLOWED.....	456
2. PARTIES.....	456
3. THE BILL AND ANSWER.....	457
Form of bill—Defense.....	
4. COMMISSION TO TAKE TESTIMONY.....	459
5. DECREE AND ITS EFFECT.....	460
Effect of probate—Transcript to be filed in Probate Court—Appeal.....	

CHAPTER XXXIII.

BILLS FOR DIVORCE.....	461
Section 1. NATURE OF.....	461

2.	CAUSES FOR DIVORCE.....	462
3.	JURISDICTION OF, AND WHERE COMMENCED.....	464
4.	PARTIES TO.....	465
5.	FRAME OF BILL.....	466
6.	NATURAL IMPOTENCY AT TIME OF MARRIAGE.....	468
	Form of bill on that ground—Affidavit to bill and of non-collusion.	
7.	ADULTERY.....	472
	Circumstantial evidence—Frame of bill charging adultery—Form by husband <i>v.</i> wife—Same by wife <i>v.</i> husband, paying for alimony and custody of children—Forms of, affidavit to.	
8.	CONVICTION OF CRIME.....	478
	Form of bill for.	
9.	DESERTION FOR TWO YEARS.....	479
	Form of bill for.	
10.	HABITUAL DRUNKENNESS.....	482
	Form of bill for, praying for alimony, etc.	
11.	EXTREME CRUELTY.....	485
	Form of bill for—Same, praying for an injunction, etc.	
12.	FAILURE TO SUPPORT.....	492
	Form of bill for.	
13.	DIVORCES GRANTED IN ANOTHER STATE.....	495
14.	SUIT TO ANNUL MARRIAGE.....	495
15.	SUIT TO AFFIRM MARRIAGE.....	496
16.	VOID MARRIAGES.....	496
17.	REFERENCE TO TAKE PROOF.....	497
	Examination of witnesses by commissioner—Questions to be asked.	
18.	INJUNCTIONS IN.....	498
19.	DEFENSES.....	500
	Condonation—Other defenses—Recrimination—Cross-bills.	
20.	HEARING AND DECREE.....	503
	Forming an issue—Form of order directing an issue of fact to be tried by a jury—Proofs—Decree—Wife entitled to dower—Children, legitimacy—Children, custody of—Restoration of property to wife—Costs—Cohabitation after divorce—Form of decree for divorce <i>pro confesso</i> , with custody of children—Same, decree for divorce upon pleadings and proofs—Same on the ground of extreme cruelty, upon verdict of a jury.	
21.	ALIMONY AND EXPENSES.....	512
	How obtained—Form of petition for <i>pendente lite</i> —Same, affidavit in support of—Same, notice of petition for—Hearing—Question of guilt not considered—The amount of allowance—How order is enforced—Form of order for temporary alimony—Same of demand for—Proceedings to compel payment of—Form of order to show cause why attachment should not issue—Same	

of attachment for contempt—Same, return of sheriff of attachment—Same of interrogatories in proceeding for contempt—Same of answers to interrogatories—Same, order of reference as to alimony *pendente lite*, and expenses—Same of report of commissioner as to allowance of alimony—Same of order confirming commissioner's report, etc.—Short form of decree for alimony, etc., *pendente lite*—Permanent alimony—Enforcement—Form of decree for permanent alimony.

CHAPTER XXXIV.

SEPARATE MAINTENANCE.....	529
Section 1. WHEN GRANTED.....	529
When proper—What must be shown.	
2. PROCEEDINGS TO OBTAIN.....	532
Where commenced—The bill—Injunction—Form of bill—Affidavit to.	
3. DEFENSES TO.....	534
4. PRACTICE IN, AND DECREES.....	534
Reference to commissioner—Form of report of—Amount of allowance—Modification of allowance—Form of decree for separate maintenance.	

CHAPTER XXXV.

SUITS FOR MAINTENANCE.....	539
Section 1. WHEN PROPER.....	539
2. PRACTICE AND PROCEEDINGS.....	539
The petition—Form of.	
3. HEARING AND DECREE.....	541
Custody of children—Assignment of property to wife—Support of wife and children—Court may change allowance.	

CHAPTER XXXVI.

BILL TO QUIET TITLE.....	543
Section 1. WHEN PROPER AND NATURE OF.....	543
Valid right must be shown—When bill may be maintained—Tax title—When not maintainable—Necessary allegation of bill— <i>Laches</i> .	
2. FORMS OF BILL.....	549
Form of bill to quiet title and to cancel deed—Same—To set aside tax deed—Same—To set aside contract of sale as a cloud.	
3. FORM OF DECREE.....	554

CHAPTER XXXVII.

NE EXEAT.....	555
Section 1. NATURE OF, AND WHEN PROPER.....	555
2. BILL FOR.....	556
Form of prayer of bill for.	
3. HOW OBTAINED, ETC.....	557
Form of allowance by circuit judge—Same by commissioner.	

CHAPTER XXXVIII.

BILLS RELATING TO TRUSTS.....	558
Section 1. NATURE OF, ETC.....	558
Removal of trustee—Appointment of trustee—Construction of instrument creating trust—Construction of wills—Delinquent assignee—Settlement of estates—Grantor of trust has no power to change terms—Limitations—Accounting against trustee—Parties to bill.	
2. FORM OF BILLS.....	563
Form of, to remove trustee, for injunction and receiver—Same for appointment of a new trustee under marriage settlement.	

CHAPTER XXXIX.

BILLS TO RESTRAIN WASTE.....	567
Section 1. NATURE OF, AND WHEN PROPER.....	567
2. FORM OF BILL.....	570
By landlord <i>v.</i> tenant to restrain waste, injunction, etc.	

CHAPTER XL.

SUBROGATION.....	572
Nature of—In what cases it applies—Suretyship or guaranty—Junior incumbrancers or purchasers—Who may be subrogated—Who can not be subrogated—Bill by surety to be subrogated—Limitation—Parties—Forms.	

CHAPTER XLI.

MARSHALING ASSETS.....	583
Nature of the remedy—Marshaling assets of partnership—Inverse order of alienation.	

CHAPTER XLII.

BILLS TO SET ASIDE JUDGMENTS..... 590

Jurisdiction—Generally—Negligence—Fraud—Want of jurisdiction—Bill by infant—Relief of sureties on bonds—Form of bill to set aside a judgment a law—Form of bill by sureties for relief, etc.

CHAPTER XLIII.

BILLS TO CORRECT MISTAKES AND REFORM DEEDS, ETC..... 597

Jurisdiction—Mistakes must be mutual—As to voluntary conveyances—As to wife's contracts as to lands of her husband—Dower—Complainant must show a right—Description—Mortgage—Amount to give jurisdiction—Land contracts—Rescission of contracts—Form of bill to correct mistakes in deed.

CHAPTER XLIV.

BILLS TO ENFORCE A VENDOR'S LIEN..... 603

Nature of—Where recognized—Where lien attaches—As to real estate—Personal property—Waiver of lien—Not assignable or transferable—Frame of bill—Form of bill—The decree.

CHAPTER XLV.

INJUNCTIONS..... 612

Section 1. NATURE AND OBJECT OF THE WRIT..... 612

2. JURISDICTION..... 613

3. IN WHAT CASES GRANTED..... 614

To restrain misapplication of public money—To restrain trespasses—A threatened injury to land—Diversion of water—Nuisance—Ejectment—Collection of note—Conveyances, etc.—Collection of taxes—Waste—Retention of water—Generally.

4. PLEADINGS..... 619

5. PRACTICE IN..... 620

By whom granted—Notice of application—Form of notice of application to circuit judge for—Form of affidavit that judge is absent from county—Notice of application to commissioner—Order for by judge—Order by commissioner—No second application can be made—Indorsement of refusal—When judges of other circuits may grant injunctions.

6. DISSOLUTION.....	624
Form of notice of motion—Form of motion—Form of order dissolving.	

CHAPTER XLVI.

PROCEEDINGS BY AND AGAINST INFANTS.....	627
Section 1. SUITS FOR.....	627
Next friend—Petition for appointment—How appointed—Consent to become next friend—Order appointing—Bond of next friend.	
2. SUITS AGAINST.....	630
Petition by infant for appointment of guardian <i>ad litem</i> .—Consent of guardian—Affidavit of infant's signature—Order appointing guardian <i>ad litem</i> —Petition by complainant for appointment of guardian <i>ad litem</i> —Order for—Petition by a relative, etc.	
3. SALE OF REAL ESTATE OF INFANTS, ETC.....	634
When allowed—Proceedings for dower—Proceeds of sale, how applied—Dower, how satisfied—Guardian's final report—General guardian, how appointed—Partition of lands of infants.	

CHAPTER XLVII.

PROCEEDINGS AGAINST CORPORATIONS.....	639
Section 1. BY A SINGLE STOCKHOLDER.....	639
2. BY ATTORNEY-GENERAL.....	640
3. JURISDICTION OVER OFFICERS OF CORPORATION.....	641
Injunctions, when allowed—Sequestration of property—Surrender of corporate rights.	
4. PROCEEDINGS AGAINST INSOLVENT CORPORATIONS.....	644
Who may apply for injunction—Appointment of receiver—Making stockholders parties—Making directors parties—Bill against stockholders—Discovery by corporation—By officers—Staying proceedings at law.	
5. VOLUNTARY DISSOLUTION OF CORPORATION.....	648
Who may apply for—Contents of application—Affidavit—Order to show cause—Publication of notice—Proceedings before commissioner—When corporation to be dissolved—Receivers—Same to give notice of appointment—Certain sales void—Debtor to account to receiver—Referring controversies—Calling meetings—Subsisting contracts—Receiver's commission—Receiver to retain certain moneys—Order of payment of debts—Second dividend—Proceedings on debts not exhibited—Distribution to stockholders—Receiver under control of court—Receiver's accounts—Duty of	

commissioner on reference—Further accounts by receiver—Corporations excepted—Suits not to abate—Suits discontinued—Appeal.

CHAPTER XLVIII.

PROCEEDINGS TO BAR DOWER OF INSANE.....	657
Section 1. WHEN PROPER.....	657
2. PETITION FOR.....	657
What petition must state.	
3. PROCEEDINGS.....	658
Appearance and answer of wife—Taking proof—Commissioner's report—Action on report—Sale by guardian—Disposition of funds—Form of petition.	

CHAPTER XLIX.

CONTEMPTS.....	662
Section 1. NATURE OF.....	662
Power of court relating to—Violation of injunction—Who may be reached by the proceeding.	
2. PROCEEDINGS BY ATTACHMENT.....	665
Foundation to be laid by affidavit—Service of copy.	
3. PROCEEDINGS BY ORDER TO SHOW CAUSE.....	666
Foundation for rule.	
4. PUNISHMENT AND DISCHARGE.....	667
Order of conviction—Process of commitment—Sequestration—Effect of contempt—Appeals from order—Admissions of solicitor—Interrogatories—Answer—Evidence—Form of affidavit in support of attachment—Form of order for attachment.	

CHAPTER L.

BILLS TO ENFORCE CONTRIBUTION.....	673
Section 1. WHEN WILL LIE.....	673
Nature of—Jurisdiction—As between sureties—Between wrongdoers—Between joint tenants—Between co-obligors—Partners—Between legatees and devisees—Between stockholders—Party wall—Parties to bill.	
2. FORM OF BILL.....	678

CHAPTER LI.

PRACTICE IN THE SUPREME COURT.....	680
Section 1. JURISDICTION OF THE SUPREME COURT.....	680
Appellate—Powers—To establish rules—To discover	

books, etc.—To prescribe practice—To prescribe powers of Circuit Court—Equal division—Majority decision—Source of power to review—Non-judicial controversies—What it reviews—Not determine facts.	
2. RULES OF THE SUPREME COURT.....	687
3. WRITS OF CERTIORARI.....	699
Common law writ—Return to—By whom allowed—Limitations—Questions of law only considered—Who may prosecute—Parties defendants.	
4. HABEAS CORPUS AND CERTIORARI.....	702
History and nature of <i>habeas corpus</i> —Who entitled to the writ—Who not entitled to—In what cases granted—Application for—To whom made—Petition for, how verified—Penalty for refusing to consider.	
5. WRITS OF ERROR.....	707
Nature of—When will lie—When not—By whom brought—Against whom—Joinder of parties—Limitation of—Extension of time for suing out—Pleas in bar—Forms.	
6. APPEALS FROM CIRCUIT COURTS IN CHANCERY.....	713
Who may appeal—Jurisdiction of appeals—When appeal lies—When not—Appeals from tax decrees—Claiming an appeal—Bond in, how approved—Setting case heard in open court—Register's return—Extending time for return—What return includes—Forms.	
7. MOTIONS.....	724
Special motion days—Notices of—Motion docket—To dismiss appeal—To dismiss writ of error.	
8. AMENDMENTS OF RECORD.....	727
No power to amend, of inferior tribunals—Further return.	
9. ASSIGNMENT OF ERRORS.....	728
On charge of court—Pleas in bar to—Release of errors—Limitations—Trial of issue of fact—Forms.	
10. PRINTED RECORD.....	733
11. PRINTED BRIEFS.....	734
12. THE ARGUMENT.....	736
Limit of—Order of.	
13. CALENDAR OF COURT.....	737
Notice to the clerk—What are calendar cases—Call of.	
14. HEARING.....	738
Powers of court on appeal—Records, etc., to be remitted to court below—Vexatious appeals—Vexatious suing out of writ of error—Damages allowed for.	
15. REHEARING.....	739
Application for—When granted.	
16. COSTS.....	742
Taxation—Re-taxation.	

CHAPTER LII.

CHANCERY RULES OF THE CIRCUIT COURT.....	746
Section 1. CHANCERY RULES.....	746
2. LAW RULES MADE APPLICABLE TO CHANCERY CAUSES.....	772

CHAPTER LIII.

MISCELLANEOUS FORMS.....	782
Forms of orders — Decrees — Petitions — Pleas — Bills— Amendments, etc.	

CHAPTER LIV.

**RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE
UNITED STATES.**

Section 1. PRELIMINARY REGULATIONS.....	799
2. PROCESS.....	801
3. SERVICE OF PROCESS.....	802
4. APPEARANCE.....	803
5. BILLS TAKEN <i>pro confesso</i>	803
6. FRAME OF BILLS.....	804
7. SCANDAL AND IMPERTINENCE IN BILLS.....	806
8. AMENDMENT OF BILLS.....	807
9. DEMURRERS AND PLEAS.....	808
10. ANSWERS.....	809
11. PARTIES TO BILLS.....	811
12. NOMINAL PARTIES TO BILLS.....	813
13. BILLS OF REVIVOR AND SUPPLEMENTAL BILLS.....	814
14. ANSWERS.....	815
15. AMENDMENT OF ANSWERS.....	815
16. EXCEPTIONS TO ANSWERS.....	815
17. REPLICATION AND ISSUE.....	817
18. TESTIMONY—HOW TAKEN.....	817
19. TESTIMONY <i>de bene esse</i>	820
20. FORM OF THE LAST INTERROGATORY.....	820
21. CROSS-BILL.....	821
22. REFERENCE TO AND PROCEEDINGS BEFORE MASTER.....	821
23. EXCEPTIONS TO REPORT OF MASTER.....	824
24. DECREES.....	825
25. GUARDIAN AND <i>prochein amis</i>	825
AMENDMENT TO RULE 41.....	826
INJUNCTION.....	826
May be granted with or without security.	
STATUTORY—EQUITY PRACTICE.....	827
Act of Congress, June 1, 1872.....	827
GENERAL INDEX.....	829
INDEX TO FORMS.....	871

PUTERBAUGH'S

MICHIGAN CHANCERY,

PLEADING AND PRACTICE.

CHAPTER I.

MICHIGAN COURTS OF CHANCERY.

How established.—The statute provides, that the several Circuit Courts of Michigan shall be courts of chancery within and for their respective counties; the powers of which shall be exercised by the circuit judges thereof; and the name and style of such court sitting in chancery shall be “The Circuit Court for the County of ——, in Chancery.”¹

Powers and jurisdiction.—Section 6611 of the statute provides that the powers and jurisdiction of the circuit courts and circuit judges in chancery, in and for their respective counties, shall be co-extensive with the powers and jurisdiction of the courts and judges of chancery in England, with the exceptions, additions and limitations created and imposed by the Constitution and laws of this State;² said circuit court in chancery shall also have jurisdiction and authority to hear and determine all cases of encroachments upon the public highways, streets and public alleys in organized townships, incorporated villages and cities in this State.³

When the principles of law by which the ordinary courts

¹ How. Stat., § 6592.

lace v. Harris, 32 Mich. 380.

² See *Ryan v. Brown*, 18 Mich. 196;
Osborn v. Bank, 9 Wheat. 738; *Wal-*

³ How Stat., § 6611.

are guided give rights, but the powers of those courts are not sufficient to afford a complete remedy, or their modes of proceeding are inadequate, it is generally admitted that a court of equity may act.¹

Practice.—The Constitution of the State provides that the Supreme Court shall, by general rules, establish, modify and amend the practice in the circuit courts, and simplify the same, and that the legislature shall, as far as practicable, abolish distinctions between law and equity proceedings.²

Section 6623 of the statute provides, that the Supreme Court shall have power, from time to time, by general rules of the court, to establish, alter, modify or amend the practice of the Circuit Courts in Chancery, in the cases not provided for by statute; and that the said court shall, as often as it may deem necessary, revise the rules of the said courts, with a view to the attainment, as far as practicable, of the following improvements in the practice, viz., the abbreviating of bills, answers and other proceedings; the expediting of the decision of causes; the diminishing of costs; the remedying of such abuses and imperfections as may be found to exist in the practice, in any class of suits cognizable in chancery; and the abolishing of all unnecessary forms and technicalities in the proceedings and practice of said courts.

Chancery rules.—Pursuant to the authority conferred upon it, the Supreme Court has, from time to time, adopted, established, altered, modified and amended the rules of practice in the circuit courts of chancery.

The present chancery rules, which took effect on January 1, 1897, together with such law rules as have been made applicable to chancery causes, appear in this work under the various subjects to which they especially appertain, and at large in chapter 52 hereof.

¹ *Wallace v. Harris*, 32 Mich. 380; Mitford, 111, 121, 122, and notes; *Wallace v. Harris*, Ibid. 391; Willard's Eq., Tit. "Dower," "Partition;" Story's Eq., §§ 650, 651, 656, 656 b, 658, 632; 1 Spence, 639, 653; 2 Ib. § 11, and notes; Comp. L. (§ 6369), (§ 5057); *Brady v. McCosker*, 1 Com. 214; *Thayer v. Lane*, Har. Chan. 247;

Wheeler v. Clinton Canal Bank, Ib. 449; *Ann. Ins. Co. v. Fish*, 1 Paige, 90; *Whitlock v. Duffield*, 2 Ed., Ch. 366; *Quick v. Stuyvesant*, 2 Paige, 84; *Mallory v. Vanderheyden*, 3 Barb. Ch. 9; *Pratt v. Northam*, 5 Mason, 95.

² Section 5, Article VI, How. Stat. § 6409.

Chancery Rule 35 provides that in cases where no provision is made by statute or by the rules, the proceedings of courts of chancery shall be according to the customary practice as it has heretofore existed in cases not provided for by statute or the written rules of the court.

Rules adopted by the circuit courts are excluded by those of the Supreme Court pertaining to the same subject.¹

By the additional and amended rules, bills of complaint and answers are required to be paragraphed and numbered, the prayer for process is made unnecessary; the time of appearance begins to run at the date of service of the subpœna; the manner of appearance has been simplified; the period of fifteen days fixed for appearance, for service of copy of bill, and for answer and replication; and the practice on answer in the nature of cross-bills has been made definite; and in many other respects the chancery practice has been simplified to a considerable extent.

¹ How. Stat. § 6467; *Wyandotte Co. v. Robinson*, 34 Mich. 428.

CHAPTER II.

GENERAL PRINCIPLES OF EQUITY PLEADING.

As has been said in regard to pleading at law, the important object to be attained in equity pleading is to bring the subject-matter of contention in a suit to an issue—to a point where a matter is affirmed on one side and denied on the other—to render the facts in each party's case plain and intelligible, and to refer the points at issue to the court, with all possible simplicity, for its decision. It is the statement, in legal form, of the facts which go to make up the charge and defense of parties in litigation; and its substantial rules are founded in the soundest and closest logic. Precision and brevity, certainty and simplicity, are to be kept constantly in view in framing pleadings. All superfluous verbiage and useless repetitions should be carefully avoided. The mode of statement must be such as to make the pleadings intelligible to the parties and the court, without recurring to possible facts which do not appear, and with such a degree of certainty that nothing can, from that pleading, be presumed to the contrary.¹

The pleadings in a suit in equity are commenced on the part of the complainant by a *Bill* or *Information*. The defense consists either of a *Demurrer*, which is a defense by law upon an admission of the facts charged in the bill, or a *Plea*, which is defined by Lord Redesdale to be "a special answer, showing or relying upon one or more things as a cause why the suit should be either dismissed, delayed or barred;"² or an *Answer* to the charges contained in the bill or information; or the defendant may demur to one part of the bill, plead to another, and answer to another, if the nature of his case requires it. To a demurrer the complainant may join as in proceedings at law; and to a plea or answer reply, which is termed a *Replication*. These various pleadings and their respective offices will be considered in subsequent chapters.

¹ Welf Eq. Pl., 3; Mont. Digest, 10, and notes, Z. S. and D.; Co. Litt. 303. ² Mitf. Ch. Pl. 177; see Coop. Eq. Pl. 223; Beame's Pl. Eq. 1.

CHAPTER III.

COMMENCEMENT OF A SUIT IN CHANCERY.

- Section 1. HOW COMMENCED.
2. WHERE COMMENCED.
3. SECURITY FOR COSTS.

SECTION 1.

HOW COMMENCED.

By bill.—Chancery Rule 1 provides that suits in chancery shall be commenced by bill of complaint setting forth the facts relied on, the names of the defendants therein, and the relief desired, and shall be addressed to the court and signed by the complainant, or his agent or solicitor.¹

The filing of the bill is the commencement of the suit, and any service had therein on process issued, or by publication of notice, made prior thereto, is a nullity.²

But where a party appears and answers, all objections to the irregularity of the proceedings to bring him into court, are waived.³

By information.—If the suit is instituted on behalf of the government, or people, or those who partake of the prerogative of the same, such as idiots and lunatics, or whose rights are under its particular protection, such as objects of public charity, etc., the matter of complaint is presented to the court by way of information, and not by way of bill or petition;⁴ by the proper officers of the crown, government, or people, as

¹ Story's Eq. Pl. § 7; Barton's Suit in Eq. 39; *Hodgen v. Guttery*, 58 Ill. 431.

² *Hodgen v. Guttery*, 58 Ill. 431; *Peltier v. Peltier*, Har. Chan. 19; see *Gordon v. Taylor*, 53 Mich. 629; *Sheridan v. Cameron*, 65 Mich. 680;

Hannah Co. v. Mosser, 105 Mich. 18; Chan. Rule 1 and 28 e.

³ *Stone v. Welling*, 14 Mich. 514.

⁴ Story's Eq. Pl. § 7; Coop. Eq. Pl. 101-107; Welf. Eq. Pl. 58; 1 Dan. Ch. Fr. 1; Lord Red. 7.

by the attorney-general or prosecuting attorney. When the suit immediately concerns the rights of the crown, government or people alone, the officers proceed purely by way of information.¹ When the suit does not immediately concern the rights of the government or people, it is brought on the relation of some person, whose interests are affected, whose name is inserted in the information, and is termed the relator, and he is answerable for costs.

The rules of practice incidental to bills in chancery and information, differ so slightly from each other, that whatever is said in this work with respect to bills, may be considered, in the main, as applicable to informations.² The space allotted will not admit of a special reference to informations.

SECTION II.

WHERE COMMENCED.

It is also provided by statute, that "Every suit in chancery shall be commenced in the circuit court for the county in which the property in dispute is situated, if the subject-matter is local, and if it is not local, in the county where one of the parties in interest resides, if either is a resident of the State; but if the subject-matter is not local, and neither party resides in the State, the suit may be brought in any county; and where it is necessary to file an information or bill in chancery, either to compel the specific performance of contract, cancellation of patents from the State, quiet title, or otherwise to affect real estate; and when such real estate may be situate in different counties, it shall be competent to file such information or bill in the equity side of the circuit court of any one of said counties in which a part of said real estate may be situate; and such court shall have complete jurisdiction in the premises as fully and effectually as if the whole of such estate were situate in the county in which suits may be commenced. And when it may be necessary to file a bill or information, or to commence any proceedings in chancery on the part or in behalf of the State, the same may, at the election of the attorney-general,

¹ Coop. Eq. Pl. 101, 102; Welf. Eq. Pl. 59; Story's Eq. Pl. § 7.

² Story's Eq. Pl. § 8; 1 Dan. Ch. Pr. 2.

be commenced in the Circuit Court for the County of Ingham, in the equity side thereof, and said court shall have complete jurisdiction and full power and authority in the premises.”¹

When the subject-matter in dispute shall not exceed one hundred dollars, the courts will dismiss, with costs to defendant, all suits in chancery concerning property, excepting suits between copartners, and suits for the enforcement of mechanics' liens, and suits for the foreclosure of mortgages. This also applies to suits to abate nuisances; and when the aid of the court is sought to protect the enjoyment of property, the court will not be governed by the mere value of the property, but will interfere, if the injury will materially lessen the enjoyment of it by the owner.²

In Illinois it has been held that where the object of a suit is not to affect real estate, the jurisdiction of the court is confined to the county of the residence of the defendants; and service of process upon a resident of another county will not confer jurisdiction.³

A court of chancery will entertain a bill for relief when the defendant resides within its jurisdiction, and the relief sought can be obtained by acting directly upon the person, whether the subject-matter of the bill be within its control or not. Of this character are cases for a specific performance of a contract for the conveyance of, or relating to, land beyond the jurisdiction of the court, where the court will compel a conveyance in accordance with the mode and form prescribed by the laws of the country in which the land is situated; and should it be necessary, in order to carry out such a decree, the defendant may be prevented by a *ne exeat* from leaving its jurisdiction *pendente lite*. This is the rule of the common law, and the statute has not changed it. But a court of chancery will not entertain a bill where the relief sought renders it necessary that it should act upon the specific thing, unless the subject-matter of the litigation is within its jurisdiction. Thus, where land is to be affected by the decree, as in cases of petition for partition, admeasurement of dower, foreclosure of mortgage,

¹How. St. § 6612.

²How. Stat. § 6613; *White v. Forbes*, Walker's Ch. 112; *Gamber v. Holben*, 5 Mich. 331; 9 Paige, 362;

Collar v. Harrison, 28 Mich. 519. See *Norris v. Hill*, 1 Mich. 202; *Huyck v. Bailey*, 100 Mich. 223. ³*Aiken v. Lloyd*, 28 Ill. 231.

or the enforcement of a mechanic's lien under the statute, the court must be able to control it directly, or it has no jurisdiction of the case. This is also a rule of the common law, which the statute has not changed.¹

SECTION III.

SECURITY FOR COSTS.

When required.—If the complainant is a non-resident, a bond in the penal sum of one hundred dollars, for costs, must be filed before commencing suit,² or there shall be endorsed on the bill a general undertaking by one or more responsible sureties, to pay all costs for which the complainant may become liable and the register shall endorse his approval of such surety or sureties.³ If he fails to do so, the suit will be dismissed on motion, supported by an affidavit, which must distinctly negative the fact that he was a resident at the time the suit was commenced.⁴

A suit instituted by two complainants, one of whom is a resident, will not be dismissed for want of a bond for costs.⁵

A motion to dismiss for want of a bond for costs must be made at the earliest stage of the proceeding. It would come too late after a demurrer,⁶ or a plea in abatement.⁷

And the court or a circuit court commissioner may, upon sufficient cause shown, require a new bond to be filed, in the same or an additional amount; and may also require security when the complainant is a resident of this State, if the justice of the case demands it.⁸

In Illinois, the statute requiring non-resident complainants to file a bond for costs before commencement of suit, applies

¹ *Enos v. Hunter*, 4 Gilm. 211; *Cooley v. Scarlett*, 38 Ill. 316. (See *Richards v. Hyde*, 21 Ill. 640.) *Voorhees v. Frisbie*, 25 Mich. 476.

² Chan. Rule 3; How. Stat. § 7269.

³ Chan. Rule 3.

⁴ *Leadbeater v. Roth*, 25 Ill. 587; *Buckland v. Goddard*, 36 Ill. 206; see, also, *Ripley v. Morris*, 2 Gilm. 381; *Hickman v. Haines*, 5 Gilm. 2;

Farnsworth v. Agnew, 27 Ill. 42; *Robert v. Fahs*, 32 Ill. 474.

⁵ *Wood v. Gosa*, 24 Ill. 626.

⁶ *The People v. Cloud*, 50 Ill. 439.

⁷ *Randolph v. Emerick*, 13 Ill. 344; see further, *Frasure v. Zimmerly*, 25 Ill. 202; *Dunning v. Dunning*, 37 Ill. 316; *R. R. Co. v. South*, 43 Ill. 176.

⁸ Chancery Rule 3; How. Stat. §§ 7298-9.

in the case of a writ of error sued out in the Supreme Court; and a security for costs in the circuit court is not liable for costs made against his principal in the Supreme Court.²

Form of bond for costs.—The bond for costs to be given before issuing process in chancery, by a non-resident, should be substantially as follows:

No. 1. Bond for costs.

Know all men by these presents, that we, A. B., of the town of ———, county of ——— and State of Michigan, as principal, and C. D., ——— of the town of ———, county of ——— and State of Michigan, as surety, are held and firmly bound unto E. F. in the sum of one hundred dollars, good and lawful money of the United States, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, jointly and severally by these presents. Sealed with our seals, and dated the ——— day of ———, A. D. 188—.

WHEREAS, the said A. B. has filed his bill of complaint in the circuit court for the county of ——— in chancery, against the said E. F. and whereas, the said A. B. is not a resident of this State.

NOW, THEREFORE, the condition of this obligation is such that if the said A. B. shall well and truly pay on demand all costs that may be decreed against him in said case of A. B., complainant, v. E. F., defendant, then this obligation to be void, otherwise in force.³

A. B. [L. S.]

C. D. [L. S.]

I hereby approve the foregoing bond, both in form and substance.⁴

G. H.,

Register.

If the suit is commenced by a non-resident without filing a bond for costs, the court will, on motion, dismiss the same with costs.⁵

¹ *Ripley v. Morris*, 2 Gilm. 381;
Hickman v. Haines, 5 Gilm. 20;
Roberts v. Fahs, 32 Ill. 474.

² *Clark v. Quackenboss*, 28 Ill. 112.

³ Chancery Rule 3; see *Skinner v. Lucas*, 68 Mich. 424.

⁴ *Maynard v. Hoskins*, 8 Mich. 260.

⁵ *Baker v. Palmer*, 83 Ill. 568.

carrying it into execution, are not considered as strictly a continuance of the former bill, but in the nature of original bills.¹ And if these bills require new facts to be stated, or new parties to be brought before the court, they are so far strictly of the nature of supplemental bills.²

Besides the different divisions of bills here enumerated, original bills are usually divided into: *first*, original bills praying relief; and, *secondly*, original bills not praying relief.

Original bills praying relief are again subdivided into three heads: *first*, original bills, praying the decree of the court touching some right claimed by the person exhibiting the bill, in opposition to rights claimed by the person exhibiting the bill, in opposition to rights claimed by the person against whom the bill is exhibited; *secondly*, bills of interpleader; and *thirdly*, *certiorari* bill.³

Original bills not praying relief, are of two kinds; *first*, bills to perpetuate the testimony of witnesses; and, *secondly*, bills of discovery.

Original bills praying relief are those most usually filed, and they will be more fully considered than those of the other sort. Bills of every kind will, however, receive consideration under proper heads.

SECTION II.

CONSTITUENT PARTS OF AN ORIGINAL BILL.

The ordinary form and structure of a bill in equity, though not originally prescribed by any positive regulations, has been long established by usage. The rules which have recently been promulgated by the superior courts of chancery in England, by the Supreme Court of the United States⁴ and by the Supreme Court of Michigan, have introduced many changes in the ancient precedents, and, if generally followed, will tend to reduce pleading and practice in equity to the simplicity and certainty of a written code;⁵ and prevent unnecessary costs

¹ Story's Eq. Pl. § 16; Coop. Eq. Pl. 16.

² *Ib.*

³ Story's Eq. Pl. § 18; Dan. Ch. Pr.

⁴ Rules 20-24 of the Supreme Court of the U. S., revised and corrected Dec. T. 1870.

⁵ Barton's Suit in Eq. 41.

and expenses, and promote brevity, succinctness, and directness in the allegations of bills and answers.

It was formerly supposed that nine distinct parts were necessary to every bill in equity; and although some of these are now admitted to be useless, it will be convenient, in analyzing the bill, to retain the ancient divisions. Forms of the constituent parts of an original bill will be given in the next chapter.

SECTION III.

I. THE ADDRESS.

In England, the bill is addressed to the Lord Chancellor, or other person having, for the time being, the custody of the great seal. In the United States, the bill is usually addressed to the judge or justices of the court in which the suit is brought, by their proper designation. This address, of course, contains the appropriate and technical description of the court, and must be varied accordingly.¹ A bill is defective, which is not addressed to the court by its proper and legal style.² In Michigan all bills and petitions should be addressed: "To the Circuit Court for the County of———, in Chancery."

SECTION IV.

II. THE INTRODUCTION.

The introductory part should contain the names and description of the persons exhibiting the bill, commonly called, in the bill, by the title of "your orators and oratrixes," according to their sex; or simply described as the "complainant," at the option of the pleader. The names of the complainants, and their places of residence, should be set out in the bill, with so much certainty, that the court and adverse party may know where to resort to compel obedience to any order, rule or process of the court, and also for the payment of costs.³

¹ Story's Eq. Pl. § 26; Mitf. Eq. Pl. 42; Coop. Eq. Pl. 9.

² *Bow v. Britten*, 2 Chicago Legal News, 33; Chancery Rule 1.

³ Lord Red. 43; Dan. Ch. Pr. 403;

Story's Eq. Pl. § 26; Barton's suit in Eq. 42; Smith's Ch. Pr. 82, 83; *Howe v. Harvey*, 8 Paige, 73; *Gore v. Pettis*, 4 Saund. Ch. 403; *Vose v. Philbrick*, 3 Story, 335.

By the twentieth rule of practice for the courts of equity of the United States, it is required that "every bill, in the introductory part thereof, shall contain the names, places of abode, and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought."

The jurisdiction of the United States court, in most cases, depends upon the citizenship of the parties; therefore, such citizenship must appear in the face of the bill; otherwise, the bill, in any stage of the proceedings, may be dismissed on motion;¹ nor is it sufficient to describe the complainant as "citizen or resident."² The want of a proper averment, in respect of citizenship, in the United States courts, may be taken advantage of by way of demurrer.³

SECTION V.

III. THE PREMISES, OR STATING PART.

This part of the bill will, of course, vary with each particular cause of complaint. It contains a narrative of the facts and circumstances of the complainant's case, and of the wrong or grievance of which he complains, the names of the persons by whom committed, and against whom he seeks redress.⁴ All the material facts, of which the complainant proposes to offer evidence, must be stated, and, as a general rule, he will not be permitted to offer, or require, evidence of any such fact not so stated.⁵ The facts, as stated in the bill, constitute the only ground of relief.⁶ A general charge or statement, however, of the matter of fact, is sufficient; and it is not necessary

¹ *Howe v. Harvey*, 8 Paige, Ch. R. 73; *Dodge v. Perkins*, 4 Mason, 435, and cases there cited; *Bingham v. Cabot*, 3 Dall. 382; *Jackson v. Ashton*, 8 Pet. 148.

² *Bingham v. Cabot*, 3 Dall. 382; *Jackson v. Ashton*, 8 Pet. 148, 112.

³ Story's Eq. Pl. § 49; *Winnipiseogee Lake Co. v. Worster*, 9 Foster, 433.

⁴ Barton's Suit in Eq. 27; Story's Eq. Pl. § 27; Mitf. Eq. Pl. 43; Coop. Eq. Pl. 9; Equity Draftsman, 4 note c; *Archibald v. Means*, 5 Ired.

Eq. R. 220; *Wright v. Dame*, 22 Pick. 55; *Lingan v. Henderson*, 1 Blann. 236; *Estep v. Watkins*, Id. 486; *Oliver v. Palmer*, 11 Gill. & J. 426; *Hayward v. Carroll*, 4 Har. & J. 518.

⁵ Story's Eq. Pl. § 28; *Irnham v. Child*, 1 Bro. Ch. 94; *Wilkes v. Rogers*, 6 Johns. R. 565; *Gordon v. Gordon*, 3 Swanst. 472; *Sidney v. Sidney*, 3 P. Wms. 276; *Watkyns v. Watkyns*, 2 Atk. 96; *Peacock v. Terry*, 9 Georgia, 148.

⁶ *Skinner v. Bailey*, 7 Conn. 496;

to charge minutely all the circumstances which may conduce to prove the general charge; for these circumstances are properly matters of evidence, which need not be charged in order to let them in as proofs.¹ But a bill filed for divorce on the ground of adultery, must state time, place and circumstance.²

The stating part, constituting the real substance of the bill, upon which the court is called to act, requires great skill and judgment to frame it accurately; and if it has not the proper legal certainty, the defect, as we shall presently see, unless removed, may become fatal in every subsequent stage of the cause.³

Certainty required.—The bill must have a reasonable certainty, but need not set out the matter with that decisive and categorical certainty which is requisite in pleading at common law.⁴ It should however, state the right, title, or claim of the complainant, with accuracy and clearness; and it should in like manner state the injury or grievance complained of, and the relief asked of the court. The other material facts ought to be plainly yet succinctly alleged, and with all necessary and convenient certainty as to the essential circumstances of time, place, manner, and other incidents.⁵ Chancery rules 2 and 10 of Michigan provide that in bills, answers and petitions which are to be verified by the oath of the party, the several matters charged, averred or admitted, shall be stated positively, or upon information or belief only, according to the fact.

Parker v. Carter, 4 Munf. 273; *Cowles v. Buchanan*, 3 Ired. Ch. R. 374; *Miller v. Furse*, 1 Bailey, Ch. R. 187; *United States Bank v. Shultz*, 3 Ham. 61; *Pinson v. Williams*, 23 Miss. 64.

¹ Story's Eq. Pl. § 28; *Chicot v. Legunse*, 2 Ves. 317, 318; *Wheeler v. Trotter*, 3 Swanst. 177; *Nesmith v. Calvert*, 1 Wood & Minn. 34; *Clarke v. Periam*, 2 Atk. 337; *Dunham v. Eaton & H. R. R. Co.*, 1 Bond, 402; *Tong v. Marvin*, 15 Mich. 60.

² *Dunn v. Dunn*, 11 Mich. 291; *Shoemaker v. Shoemaker*, 20 Mich.

222; *Randall v. Randall*, 31 Mich. 194.

³ Story's Eq. Pl. § 27; *Flint v. Field*, 2 Anst. 343; *Coop. Eq. Pl. 11*; *White v. Yaw*, 7 Vt. R. 357; *Harrison v. Nixon*, 9 Pet. 483; *Langdon v. Goddard*, 2 Story, 267.

⁴ 1 Barb. Ch. Pr. 28; 3 Woodes. Lect. 55, p. 370; *Cockrell v. Gurley*, 26 Ala. 405; *Birley v. Staley*, 5 Gill. & J. R. 432; *Tiernan v. Poor*, 1 Gill. & J. R. 216; *Surget v. Byers*, 1 Hemp. 715.

⁵ Mitf. Eq. Pl. 41; *Coop. Eq. Pl. 5*; *Shepard v. Shepard*, 6 Conn. R. 37; *Egremont v. Cowell*, 5 Beav. 620-623.

A party seeking the aid of a court of equity should show distinctly and unambiguously all the facts necessary to entitle him to that aid.¹ The right, title and interest of the complainant should be stated with accuracy, clearness and precision, and the proof in the case must correspond with the allegations;² but the claims of the defendant may be stated in general terms.³

The complainant is not bound to set forth his adversary's rights with the same particularity as his own. And where the extent and character of those rights are more particularly within the knowledge of the adverse party, it is sufficient to allege generally that the defendant has, or claims to have, some rights relative to the subject-matter of the controversy, leaving him to disclose in his answer the nature and extent of them.⁴ Or the complainant may anticipate a defense, and allege any matter necessary to explain or avoid it; or omitting to do so, on the coming in of the answer he may introduce the new matter into the case by an amendment to the bill.⁵

The material allegations of the bill must be clearly and positively averred;⁶ and not by way of recital. And a party can not have relief upon a case not stated in his bill.⁷

¹ *Manning v. Drake*, 1 Mich. 34; *LeBaron v. Shepherd*, 21 Mich. 272, and cases cited; *Shepard v. Shepard*, 6 Conn. R. 37; *United States Bank v. Shultz*, 3 Ham. R. 61; *Mercier v. Lewis*, 39 Cal. 532; *Egremont v. Cowell*, 5 Beav. 620; *Flint v. Field*, 2 Anst. 548; *Waugh v. Robins*, 33 Ill. 182.

² *Page v. Webster*, 8 Mich. 263; *Fitzpatrick v. Beatty*, 1 Gilm. 454; *Webster v. Webster*, 55 Ill. 325; *Gibson v. Carson*, 3 Ala. R. 421; *Thayer v. Lane*, Walk. Ch. R. 200; *Knox v. Smith*, 4 How. U. S. R. 298; *Tilton v. Tilton*, 9 New Hamp. 385; *Harris v. Knickerbocker*, 5 Wend. 638; *Seltz v. Unna*, 6 Wall. 327.

³ Story's Eq. Pl. § 255; Eq. Draft. 5 note c.

⁴ *Morgan v. Smith*, 11 Ill. 194; *Barring v. Nash*, 1 Ves. & B. R. 551;

1 Barb. Ch. Pr., 40; *Aikin v. Ballard*, Rice Ch. 13; see *Van Antwerp v. Hulburd*, 8 Blatchf. U. S. C. C. 282.

⁵ *White v. Morrison*, 11 Ill. 361.

⁶ *Primmer v. Patton*, 32 Ill. 528; *Wright v. Dame*, 22 Pick. 55; *McElwain v. Willis*, 9 Wend. 548; *McIntyre v. Trustees, etc.*, 6 Paige, Ch. R. 239; *Spense v. Duren*, 3 Ala. 250; *Daniels v. Taggart*, 1 Gill & J. 311; *Hood v. Inman*, 4 Johns. Ch. R. 437; *Edwards v. Chilton*, 4 W. Va. 352; *Manning v. Drake*, 1 Mich. 34; *Wilson v. Eggleston*, 27 Mich. 257; *Craig v. Bradley*, 26 Mich. 353; *Curtis v. Goodenow*, 24 Mich. 18; *Denison v. Gibson*, 24 Mich. 187; *Williams v. Hubbard*, 1 Mich. 446; *Shoemaker v. Gardner*, 19 Mich. 96.

⁷ *White v. Yaw*, 7 Vt. 357; *Wood*

The pleadings should consist of nothing but a clear statement of facts. All matters of inference or argument are impertinent, and will be expunged, and usually with costs.¹

Whatever is intended to be proved should be alleged, otherwise evidence can not be received of the facts;² and the facts ought to be so fully and particularly stated that the chancellor can see, from the face of the bill, whether or not he has jurisdiction, and supposing the same to be true, tell precisely what decree to render.³ And if a bill, as presented, does not exhibit a case for the interference of a court of equity, it may be dismissed or demurred to for want of equity;⁴ but it will not be dismissed for that cause, unless it is radically such, so that no discovery or proof can make it a proper subject of equitable jurisdiction.⁵ If it shows grounds for relief, but states them imperfectly, it may be aided by the proofs or admissions;⁶ but if the facts are so imperfectly stated that the court can not decide upon the merits from the facts alleged, the bill will be dismissed.⁷ A bill must, at the final hearing, show that the

v. Genet, 8 Paige, Ch. R. 137; *Page v. Greeley*, 75 Ill. 400; *Morton v. Smith*, 86 Ill. 117; *Thayer v. Lane*, Walk. Ch. 200; *Jerome v. Hopkins*, 2 Mich. 96; *Cicotte v. Gagnier*, 2 Mich. 381; *Warner v. Whittaker*, 6 Mich. 133; *Bloomer v. Henderson*, 8 Mich. 395; *Boomer v. Caldwell*, 8 Mich. 463; *Barrows v. Baughman*, 9 Mich. 213; *Wurcher v. Hewett*, 10 Mich. 453; *Peckham v. Buffum*, 11 Mich. 529; *Dunn v. Dunn*, 11 Mich. 284; *Perkins v. Perkins*, 12 Mich. 456; *Moran v. Palmer*, 13 Mich. 367; *Converse v. Blumrich*, 14 Mich. 109; *Hubbard v. Winsor*, 15 Mich. 146; *Payne v. Avery*, 21 Mich. 524; *Fosdick v. Van Huseon*, 21 Mich. 567; *Harwood v. Underwood*, 28 Mich. 427; *Ford v. Loomis*, 33 Mich. 121; *Connarton v. Millar*, 41 Mich. 608; *Geney v. Maynard*, 44 Mich. 578.

¹ *Hood v. Inman*, 4 Johns. Ch. Rep. 437; *Chalmers v. Chalmers*, 4 Gill & J. 420; *Sheldon v. Robbins*, 2 Root, 190.

² *Hayward v. Carroll*, 4 Har. & J.

518; *Parker v. Carter*, 4 Munf. 273; *Hodgins v. White*, 2 Ired. Ch. R. 575; *Crocket v. Lee*, 7 Wheat. 522; *Story's Eq. Pl.* §§ 28, 257.

³ *Pennebaker v. Wathan*, 2 A. K. Marsh. 315; *Dunham v. Eaton, etc.*, R. R. Co., 1 Bond, 492.

⁴ *Reed v. Johnson*, 24 Maine, 322; *Morel v. Houston*, Charl. R. M. 284; *Winkler v. Winkler*, 40 Ill. 179; *Sheldon v. Harding*, 44 Ill. 68; *Vieley v. Thompson*, 44 Ill. 9; *Bruen v. Bruen*, 43 Ill. 409.

⁵ *LeRoy v. Veeder*, 1 Johns. Ch. R. 417; *Holman v. Holman*, 3 Desau. 210; *Wright v. Dame*, 22 Pick. 55; *Clark v. Davis*, Har. Ch. 227; *Thayer v. Lane*, Har. Ch. 247; *Hawkins v. Clermont*, 15 Mich. 511.

⁶ *Gorham v. Wing*, 10 Mich. 486; *Babcock v. Twist*, 19 Mich. 516; *Moran v. Palmer*, 13 Mich. 367; *Edwards v. Massey*, 1 Hawks, 359; *Fisher v. Stone*, 3 Scam. 68.

⁷ *Fowler v. Sanders*, 4 Call. 361; *Whittaker v. Degraffenreid*, 6 Ala. 303; *White v. Lewis*, 2 A. K. Marsh.

matter of it is within the jurisdiction of a court of chancery.¹

The material facts relied upon for relief, must be so distinctly alleged in the bill, that the defendant can readily put them in issue, or the relief can not be granted, though the facts be proved;² and no admission in an answer to a bill can, under any circumstances, lay the foundation for relief under any specific head of equity, unless it be substantially set forth in the bill.³ And a defect in the charging part of a bill, can not be supplied by a subsequent interrogatory; and the interrogatories are to be construed by the charging part of the bill; nor can defects in the charging part be supplied by any subsequent proceedings in the case.⁴

Where the facts stated in the bill are disproved, or are defectively stated, relief may be granted in some instances, upon the facts stated in the answer.⁵

Where a party comes into equity to open a settled account on the ground of error, the bill must contain a precise specification of the errors, otherwise the complainant will not be allowed to prove them at the hearing, even though the settlement of the account is expressed to be "errors excepted," which is the usual form of settling accounts.⁶

Where a party has an adequate remedy at law, a court of

123; *Clark v. Bell*, 2 B. Monroe, 1; *Salisbury v. Miller*, 14 Mich. 160; *Curtis v. Goodenow*, 24 Mich. 18.

¹ *Estep v. Watkins* 1 Bland, 486; *Townshend v. Duncan*, 2 Id. 45; *Herbert v. Hobbs*, 3 Stewart, 9; *Moore v. Dail*, Id. 155; *McGrew v. Tombeckbee Bank*, 5 Porter, 547; *Meyer v. Pfeiffer*, 50 Ill. 485.

² *Lebaron v. Shepherd*, 21 Mich. 271; *Harding v. Handy*, 11 Wheat. U. S. 103; *Skinner v. Baily*, 7 Conn. 496; *Wiggin v. Mayor, etc.*, 9 Paige, Ch. R. 16; *Gibson v. Carson*, 3 Ala. 421; *Knox v. Smith*, 4 How. 298; *Kidd v. Manley*, 6 Cush. 156.

³ *Jackson v. Ashton*, 11 Pet. 229; *Thomas v. Warner*, 15 Vt. 110; *Story's Eq. Pl. §§ 28, 257, 263;*

Crocker v. Lee, 7 Wheat. 522; *Maury v. Lewis*, 10 Yerger, 115.

⁴ *Mechanics' Bank v. Levy*, 3 Paige, Ch. R. 606; *Cowles v. Buchanan*, 3 Ired. Ch. 374; *Parker v. Carter*, 4 Munf. 273; *Kisor v. Stancifer*, Wright, 323; *Story's Eq. Pl. § 27.*

⁵ *Lingan v. Henderson*, 1 Bland, 236; *Townshend v. Duncan*, 2 Id. 45; *West v. Hall*, 3 Har. & J. 221; *Edwards v. Massey*, 1 Hawks, 359.

⁶ *Salisbury v. Miller*, 14 Mich. 160; *Deatley v. Murphy*, 3 A. K. Marsh. 474; *Maury v. Lewis*, 10 Yerger, 115. But see *Jackson v. Ashton*, 11 Pet. 229; *Thomas v. Warner*, 15 Vt. 110; *Story's Eq. Pl. §§ 257, 264; Diley v. Barnard*, 8 Gill & J. 171.

⁷ *Mebane v. Mebane*, 1 Ired. Eq. R. 403; *Baker v. Biddle*, 1 Bald. 324.

equity will not interfere,¹ except in cases of fraud. Fraud is a matter of chancery jurisdiction, and that court would not lose it merely by the statute conferring a similar jurisdiction upon courts of law.² And if the remedy at law is doubtful, a court of equity may relieve.³

A complainant must allege in his bill, that he has done, or offered to do, or is ready to perform, everything necessary to entitle him to the relief he seeks, or a sufficient excuse for its non-performance.⁴ It is a maxim of equity, of universal application, that he who seeks equity must do equity.⁵

Where the facts are charged in the bill to be, or must, from the necessity of the case, be, within the knowledge of the defendant only, a precise allegation is not necessary.⁶

A bill may be framed with a double aspect, so that, if one ground fail, the complainant may rely upon another, which may be inconsistent with the former.⁷

Where relief is sought on the ground of fraud or usury, the charges should not be general, but the facts and circumstances upon which the charge is founded, should be fully and specifically stated.⁸ If an allegation be equivocal, and two mean-

¹ *Smith v. Powell*, 50 Ill. 21; *Thomas v. Caldwell*, Id. 139; *School, etc., v. Miller*, 54 Ill. 338; *Winkler v. Winkler*, 40 Ill. 179; *Gardner v. Kerssey*, 39 Geo. 664; *Bassett v. Brown*, 100 Mass. 355; *Ohling v. Luitjens*, 32 Ill. 23; *Taylor v. Turner*, 87 Ill. 296; *Barrons v. Doty*, Har. Ch. 1; *Bennett v. Nichols*, 12 Mich. 22; *Wales v. Newbould*, 9 Mich. 45.

² *Wheeler v. Bank*, Har. Ch. 449; *Babcock v. McCamant*, 53 Ill. 215; *Beaugenon v. Turcotte*, Breese, 167; *Armstrong v. Caldwell*, 2 Scam. 418; *Weirick v. DeZoya*, 2 Gilm. 338; *Scott v. Whitlow*, 20 Ill. 310; *Glas-tenburg v. McDonald*, 44 Vt. 450; *Freeman v. Keagan*, 26 Ark. 373.

³ *Ankrim v. Woodworth*, Har. Ch. 335; *Wheeler v. Clinton Canal Bank*, Har. Ch. 449; *Edsell v. Briggs*, 20 Mich. 429.

⁴ *Oliver v. Palmer*, 11 Gill & J. 426; *Walburn v. Ingilby*, 1 Mylne & Keene, 61; *De Wolf v. Pratt*, 42 Ill.

198; *Warner v. Richmond*, 53 Ill. 52; *Supervisors v. Henneberry*, 41 Ill. 179.

⁵ *Mich. State Bank v. Hammond*, 1 Doug. 257; *Morris v. Hoyt*, 11 Mich. 9; *Conway v. Waverly*, 15 Mich. 257; *Smith v. Auditor-General*, 20 Mich. 398; *Merrill v. Auditor-General*, 24 Mich. 170; *Putnam v. Reynolds*, 44 Mich. 113; *Corby v. Bean*, 44 Mo. 379; *Stowe v. Russell*, 36 Ill. 18, 29.

⁶ *Aikin v. Ballard*, Rice, Ch. 13; *Morgan v. Smith*, 11 Ill. 194.

⁷ *Varick v. Smith*, 5 Paige, Ch. R. 137; *Murphy v. Clark*, 1 S. & M. 221; *Baines v. McGee*, Id. 208; *Hart v. McKeen*, Walker's Ch. 417.

⁸ *Newell v. Bureau Co.*, 37 Ill. 253; *Elston v. Blanchard*, 2 Scam. 420; *Hovey v. Holcomb*, 11 Ill. 660; *McConnel v. Gibson*, 12 Ill. 128; *Klein v. Horine*, 47 Ill. 430; *Henry Co. v. Winnebago Drain Co.*, 52 Ill. 299; *Lewis v. Lewis*, 9 Mo. 183; *Miller v.*

ings present themselves, the one most unfavorable to the pleader will be adopted.¹

Exhibits.—If a bill makes an instrument a part thereof, without setting forth the contents, or annexing a copy, it is bad on demurrer.² Where a bill of complaint refers to a deed or other instrument in this wise, “as in and by said indenture reference being thereunto had, when produced will more fully and at large appear,” the whole document referred to is made a part of the record, although not fully or accurately recited in the bill, and the complainant may, at the hearing, avail himself of such portions as are not recited, and also those portions inaccurately set forth.³ The exhibits are not a part of the bill, but are part of the proof, and can not aid defective statements in the bill.⁴ Copies of deeds filed with the bill as exhibits, are made, in legal intendment, portions thereof, and should be objected to before the hearing, if at all.⁵ And where the execution of a deed has been admitted in the answer, and a copy has been filed, as an exhibit, it can not be objected to for the first time at the trial.⁶ It is sufficient to allege the undertaking in a legal instrument, according to its legal effect.⁷

The bill must state the whole subject, and not too many subjects—*Matters in litigation not divisible.*—The bill must be brought for the whole subject in dispute. The court will not permit a bill to be brought for a part of a matter only, so

Colton, 5 Geo. 516; *Witherspoon v. Carmichael*, 6 Ired. Eq. 143; *Fraser v. Hart*, 2 Strobb. Eq. 250; *Steed v. Baker*, 13 Gratt. 380; *Smell v. Boudinot*, 1 Stockt. N. J. 381; *Moore v. Green*, 19 How. U. S. 69; *Very v. Levy*, 13 How. U. S. 345; *Badger v. Badger*, 2 Wall. 87; *Langdon v. Goddard*, 2 Story, 267; *Magniac v. Thompson*, 2 Wall. Jr. C. C. 209; *Hale v. Chandler*, 3 Mich. 531; *Tong v. Marvin*, 15 Mich. 60.

¹ *LeBaron v. Shepherd*, 21 Mich. 272; *Shedden v. Patrick*, 28 E. L. & E. R. 56, 68; *Foss v. Harbottle*, 2 Hare. 461, 562; *Vernon v. Vernon*, 2 Mylne & Craig, 145; *Balls v. Margrave*, 3 Beav. 284; *Chase v. Humphrey*, 6 Conn. R. 130; *Columbine v.*

Chichester, 2 Phil. 28; *McElwain v. Willis*, 9 Wend. 549; *Ferriss & Eaton v. N. A. F. I. Co.*, 1 Hill, 71; *Slocum v. Clark & Saxton*, 2 Hill, 475; *Holligan v. R. R. Co.*, 15 Ill. 558; *Lemon v. Stevenson*, 36 Ill. 49; *Vining v. Leeman*, 45 Ill. 246; *Happy v. Morton*, 33 Ill. 398; *West v. Schnebly*, 54 Ill. 523.

² *Martin v. McBryde*, 3 Ired. Ch. 531; *King v. Trice*, 3 Ired. Ch. 568.

³ *Swetland v. Swetland*, 3 Mich. 482; 1 Daniels, Ch. Pl. & Pr. 420.

⁴ *Caton v. Willis*, 5 Ired. Ch. 335.

⁵ *Surget v. Byers*, 1 Hemp. 715.

⁶ *Green v. Campbell*, 2 Jones' N. C. Eq. R. 446.

⁷ *Jerome v. Hopkins*, 2 Mich. 96.

as to expose a defendant to be harassed by repeated litigations concerning the same thing;¹ nor for one of two claims upon the same defendant.²

Multifariousness.—As the bill should not omit anything which is material to state, it is equally important that it should not run into the opposite defect, and attempt to embrace too many objects, it being a rule in equity that two or more distinct subjects can not be included in the same suit. The offense against this rule is termed *multifariousness*, and will render a bill liable to demurrer.³ As to what constitutes multifariousness, it is impossible to lay down a general rule; every case must be governed by its own circumstances, and the court must exercise a sound discretion on the subject.⁴ Joint and separate demands can not be joined in a bill without rendering it multifarious.⁵ And as a bill by the same complainant against the same defendant, for different matters, would be considered multifarious, so *a fortiori*, would a bill by several complainants, demanding distinct matters against the same defendant.⁶ But a bill does not become multifarious because all the complainants are not interested to an equal extent.⁷

¹ Mitf. Eq. Pl. 133; 1 Barb. Ch. Pr. 40.

² *Purfoy v. Purfoy*, 1 Vern. 29; 1 Barb. Ch. Pr. 40.

³ *Wales v. Newbould*, 9 Mich. 58; *Taylor v. King*, 32 Mich. 42; See, also, *Wheeler v. Bank*, Har. Ch. 449; *Ingersoll v. Kirby*, Walk. Ch. 65; *Page v. Webster*, 8 Mich. 263; *Huntton v. Platt*, 11 Mich. 264; 1 Dan. Ch. Pr. 437; 1 Barb. Ch. Pr. 40; *Supervisors v. State's Attorney*, 31 Ill. 74; *Oliver v. Piatt*, 3 How. U. S. R. 333; *Many v. Beekman Iron Co.*, 9 Paige, Ch. R. 188; *Luckett v. White*, 10 Gill & J. 480; *Abraham v. Plethora*, 3 Wend. 538; *Thurman v. Sheldon*, 10 Yerger, 388; *Buffalow v. Buffalow*, 2 Ired. Ch. 113; *Snook v. Pearsall*, 95 Mich. 534; *Burnham v. Dillon*, 100 Mich. 352.

⁴ *Wales v. Newbould*, 9 Mich. 45; *Gaines v. Chew*, 2 How. U. S. R. 619; *Warren v. Warren*, 56 Maine,

300; *Oliver v. Piatt*, 3 How. U. S. 333; Id. 2 McLean, 267; *Shields v. Thomas*, 18 How. U. S. 253; *Fitch v. Creighton*, 24 How. U. S. 159; *McLean v. Bank*, 3 McLean, 415; *Sedam v. Williams*, 4 McLean, 55; *Childs v. Pellett*, 102 Mich. 558.

⁵ *Hart v. McKeen*, Walk. Ch. 417; *Harrison v. Hogg*, 2 Ves. Jr. 323; *Boyd v. Hoyt*, 5 Paige, Ch. R. 65; *Ingersoll v. Kirby*, Walk. Ch. 65; *Ryan v. Trustees*, 14 Ill. 20; *Burnett v. Lester*, 53 Ill. 325; *West v. Randall*, 2 Mason, 181; see *Atwill v. Ferrett*, 2 Blatchf. C. C. 40.

⁶ *Jones v. Garcia, Del Rio*, 1 Turn. & Russ. 301; 1 Barb. Ch. Pr. 40; *Supervisors v. State's Attorney*, 31 Ill. 74; *Sheriff v. Oil Co.*, 7 Phil. (Pa.) R. 4; *Darcy v. Lake*, 46 Miss. 109.

⁷ *Kuye v. Moore*, 1 Sim. & Stu. 61; 1 Barb. Ch. Pr. 41; *Clarkson v. DePeyster*, 3 Paige, Ch. R. 320; *Bank*

When the object of the bill is single, to establish and obtain relief for one claim in which all the defendants may be interested, it is not multifarious, although the defendants may have different and separate interests;¹ thus several underwriters on a policy of insurance may join in a bill in equity against the assured.² A bill brought against several defendants, seeking redress for injuries arising out of transactions with them, separately, at different times, and relating to different subjects, would be bad for multifariousness.³ Two good causes of action arising out of the same transaction in which all the defendants are interested in the same claim of right, may be joined in one suit without being multifarious.⁴ But if a claim against several defendants is joined with a claim in which one only of the defendants is interested, and which is wholly disconnected with the claim against all the defendants, all or either of them may demur for multifariousness.⁵ A bill in which demands against the defendant, in his private capacity, are joined with demands against him as executor, etc., will be dismissed on demurrer.⁶ A bill is not multifarious if it be single as to the subject-matter and object thereof, and the relief sought, if all the defendants are connected, though differently, with the whole subject of dispute;⁷ and where a bill is framed with a two-fold object, either for a specific delivery of the property, or an enforcement of a supposed lien, it is not multifarious.⁸

It seems that the objection of multifariousness is confined to cases where the case of each defendant is entirely distinct and separate in its subject-matter from that of his co-defendants, for the case of one defendant may be so entire as to be

v. *Carpenter*, Wright, 729; *Shields v. Thomas*, 18 How. U. S. 253.

¹ *Bugbee v. Sargeant*, 23 Maine, 269.

² *Buckley v. Starr*, 2 Day, 552.

³ *Coe v. Turner*, 5 Conn. 86; *Mix v. Hotchkiss*, 14 Conn. 32; *Ingersoll v. Kirby*, Walk. Ch. 65; *Burnett v. Lester*, 53 Ill. 325; *Walker v. Taylor*, 42 Ala. 297; *Durling v. Hammer*, 20 N. J. Eq. 220; *Supervisors v. Stutte's Attorney*, 31 Ill. 74.

⁴ *Varick v. Smith*, 5 Paige, Ch. R. 137.

⁵ *Swift v. Eckford*, 6 Paige, Ch. R. 22.

⁶ *Davone v. Fanning*, 4 Johns. Ch. R. 199; *Gill v. Clagett*, 2 Gill & J. 14; *Bryan v. Blithe*, 4 Blackf. 249.

⁷ *Watson v. C. c.*, 1 Ired. Ch. R. 389; *Vann v. Lurget*, 2 Dev. & Bat. Ch. 31; see *Payne v. Hook*, 7 Wall. 425.

⁸ *Murphy v. Clark*, 1 S. & M. 221; *Baines v. McGee*, Id. 208; 9 Yerger, 287; *Whitney v. Whitney*, 5 Dana, 327.

incapable of prosecution in several suits, and some other defendant may be a necessary party to only a portion of the case; in which latter case, multifariousness is not an available objection.¹

If the owner of the equitable title to land, in a bill to compel a conveyance of the legal title to him, should join the owner of adjoining land as a defendant to settle a disputed question of boundary, the bill would be multifarious.²

Where separate contracts are made with the same individual, with respect to the same subject-matter, they may be combined in one bill;³ and persons holding distinct interests under the same title may join in a suit for investigating their equity;⁴ but several complainants claiming distinct rights, having no community of interests, can not join in the same action;⁵ nor can several injuries by separate persons be joined in chancery any more than at law.⁶

Several property owners may join in the same bill to restrain the collection of an illegal tax assessed against them severally, asking relief against the same injury on the same ground.⁷

Where several parties are joined as complainants, the bill must make a common cause for complainants, or it will be multifarious. A bill to enforce the collection of a tax is multifarious, if a portion of the errors complained of affect a part only of the complainants.⁸

It has been held that because the prayer of a bill in chancery asks for different kinds of specific relief in relation to the same subject-matter, against the same parties, and in favor of the same persons, it does not make the bill multifarious.⁹

That a bill asks for different kinds of specific relief in favor of the same subject-matter, and between the parties does not make it multifarious.¹⁰

¹ *Kennedy v. Kennedy*, 2 Ala. 571.

² *Hickman v. Cooke*, 3 Humph. 640.

³ *Lynch v. Johnson*, 2 Litt. 98; *Hart v. McKeen*, Walk. Ch. 417.

⁴ *Tilford v. Henderson*, 1 A. K. Marsh. 483; *Scrimyer v. Buchanan*, 3 A. K. Marsh. 219; *Bank v. Carpenter*, Wright, 729.

⁵ *Taylor v. King*, 32 Mich. 42; *Barry v. Rogers*, 2 Bibb, 314; *Armstrong v. Athens Co.*, 10 Ohio, 235; *Ohio v. Ellis*, 10 Ohio, 456.

⁶ *Burnett v. Lester*, 53 Ill. 325; *Clamorgan v. Guisse*, 1 Mo. 131; *Wales v. Newbould*, 9 Mich. 58.

⁷ *Coal Co. v. Blanchard*, 54 Ill. 240; *Harward v. Drainage Co.*, 51 Ill. 130; see *Cutting v. Gilbert*, 5 Blatchf. C. C. R. 259.

⁸ *Kerr v. Lansing*, 17 Mich. 34; *Schofield v. Lansing*, 17 Mich. 437.

⁹ *Cleland v. Casgrain*, 92 Mich. 139.

¹⁰ *Densmore v. Savage*, 67 N. W. 1108; 110 Mich. 27.

Scandal and impertinence.—In framing a bill, the solicitor should see that it does not contain statements or charges which are scandalous or impertinent; for if it does, it may be excepted to by the defendant, and the court will order such parts to be expunged, with costs against the party offending.¹

Scandal consists in the allegation of anything which is unbecoming the dignity of the court to hear, or is contrary to good manners, or which charges some person with a crime not necessary to be shown in the cause.² To which may be added that any unnecessary allegation bearing cruelly upon the moral character of an individual, is also scandalous.³

When a bill is not pertinent, or unnecessarily reflects upon the opposite party, such portions of it will be stricken out, at the cost of the solicitor so offending. Neither suitors nor solicitors should be allowed to manifest their personal feelings upon the records of the court.⁴

Impertinence is the same kind of fault in pleadings in equity which in those at common law is denominated surplusage. This at law, taken in its largest sense, includes the introduction of unnecessary matter of whatever description, and includes the admission of matter wholly foreign, as well as of matter, which, though not wholly foreign, does not require to be stated, or which, if stated, should be stated with conciseness.⁵ It is not impertinence, in a bill amended after answer, to adopt the language of the answer, and set forth its averment by way of pretense, with a charge to meet them.⁶ In a bill to remove a trustee, it is not scandalous or impertinent to challenge every act of the trustee as misconduct, nor to impute to him corrupt and improper motives in the execution of his trust; nor to allege that his conduct is the vindictive consequence of some act on the part of the *cestui que trust*, or of some change in his situation. But it is impertinent, and may be scandalous, to state any circumstances as evidence of general malice or personal hostility; because the fact of malice or

¹ Dan. Ch. Pr. 451-2; 1 Barb. Ch. Pr. 41; *McConnell v. Holobush*, 11 Ill. 61.

² 1 Barb. Ch. Pr. 41; Prac. Reg. 383.

³ *Coffin v. Cooper*, 6 Ves. 514.

⁴ *McConnell v. Holobush*, 11 Ill. 61; 1 Dan. Ch. Pr. 451.

⁵ Steph. on Pl. 422; 1 Barb. Ch. Pr. 41; *Langdon v. Pickering*, 19 Maine, 214.

⁶ *Sleepy v. Boehm*, 2 Mad. 176.

hostility, if established, affords no necessary or legal inference that the conduct of the trustee results from such motives, and because such a course tends to render a bill in equity an instrument of inquisition into the private life of every trustee.¹

The object of a pleading of any kind is to state the facts upon which the rights of the parties depend and nothing more. Where a bill in chancery contains irrelevant and impertinent matter, such as mere legal arguments, and reasons occurring to counsel why this or that step should or should not be taken, and the violation of the rules of pleading is palpable and gross, the court itself will direct the irrelevant and impertinent matters to be eliminated.²

SECTION VI.

IV. CONFEDERATING PART.

The confederating part contains a general allegation or general charge of a confederacy between the defendants and other persons to injure or defraud the complainant. The usual form of the charge is that the defendants, combining and confederating together, and with divers other persons, as yet to the complainant unknown, but whose names, when discovered, he prays may be inserted in the bill, and they be made parties defendants thereto, with proper and apt words to charge them with the premises in order to injure and oppress the plaintiff in the premises, do absolutely refuse, etc., or pretend, etc.³ Though the charge of confederation is usually made in the bill it is treated as entirely nugatory, and need not be denied or responded to in the answer;⁴ and may be omitted in the bill, or inserted, at the option of the complainant.⁵

SECTION VII.

V. CHARGING PART.

Although the charging part of the bill is generally inserted, yet it is not essential that it should be. That part of the bill

¹ Barb. Ch. Pr. 41; *Earl of Portsmouth v. Fellows*, 5 Mad. 450.

² *Pinneo v. Goodspeed*, 104 Ill. 185.

³ Story's Eq. Pl. § 29; Barton's Suit in Eq. 33; Coop. Eq. Pl. 9; Eq. Draft. 5-6.

⁴ Story's Eq. Pl. § 29; Eq. Draft. 5 note d; Barton's Suit in Eq. 33; Coop. Eq. Pl. 10; 1 Hoff. Ch. Pr. 41; 1 Dan. Ch. Pr. 375.

⁵ Eq. Pr. U. S. S. C. 1870, Rule 21; 8 Ves. 404; 3 Mad. 11.

may be omitted.¹ The equitable ground of relief, on the part of complainant, must appear in the *stating part* of the bill; for if the equity only appears in the charging part, the bill will be demurrable.² If the complainant can foresee the matter which the defendant will set up to protect himself against the allegations of the bill, such matter may be introduced by this mode of charging, which affords an opportunity of rebutting its effects, by charging facts of an opposite tendency.

SECTION VIII.

VI. JURISDICTIONAL CLAUSE.

This part of the bill is intended to give jurisdiction of the suit to the court by a general averment, that the acts complained of are contrary to equity, and tend to the injury of the complainant, and that he has no remedy, or not a complete remedy, without the assistance of a court of equity.³ This clause in the bill, however, is wholly unnecessary, and the omission of it does not render the bill defective,⁴ and it may be used or not, at the discretion of the complainant.⁵

SECTION IX.

VII. INTERROGATING PART.

The interrogating part of the bill contains a prayer that the defendants may answer all and singular the matters contained in the stating and charging parts of the bill, not only according to their respective knowledge and remembrance of the facts stated, but also, according to the best of their several and respective hearsay, information and belief. The bill usually requires an answer under oath; but under the statute of Michigan, as well as several other states, the complainant may waive the necessity of the answer being made on the oath of

¹ Welf. Eq. Pl. 102; *Partridge v. Haycraft*, 11 Ves. 575; Story's Eq. Pl. § 33; Eq. Pr. U. S. S. C. Rule 21.

² *Flint v. Field*, 2 Anst. 543; *Farren's Bill* in Ch. 27; *Gregory v. Molesworth*, 3 Atk. 626.

³ *Barton's Suit* in Eq. 27, 28;

Story's Eq. Pl. §§ 10, 34; Coop. Eq. Pl. 10, 11.

⁴ Story's Eq. Pl. § 34; Lord Red. 44; 1 Dan. Ch. Pr. 573, note; *Bateman v. Willoe*, 1 Sch. & Lef. 204; Welf. Eq. Pl. 104.

⁵ Eq. Pr. U. S. S. C. 1870, Rule 21; Eq. Draft. 5, note g.

the defendant. The general interrogatory in a bill is sufficient to entitle a party to a full answer to all the matters stated.¹ But this fact has not, in practice, precluded the use of special interrogatories, which are sometimes regarded as of great importance in enlarging a general charge, and extending it to all the minute and collateral circumstances attending the fact. Yet, under the Michigan practice, they are very rarely used.

SECTION X.

VIII. PRAYER FOR RELIEF.

The bill must also contain a prayer for relief. This must depend upon the facts of each case, and the nature of the relief sought, and should be framed with great care. Unless there is a prayer, there can be no relief for the complainant.² And if, for any reason founded on the substance of the case, as stated in the bill, the complainant is not entitled to the relief he prays, either in whole or in part, the defendant may demur.³

The prayer for relief is divided into two kinds: Prayer for specific relief, and prayer for general relief. In most cases a prayer for general relief is sufficient to enable the complainant to obtain such a decree as his case entitles him to; but it is the usual and better practice for the complainant to pray, first for such specific relief as he thinks he ought to have, and then for general relief.⁴ But under the prayer for general relief, such relief only can be granted as the case stated in the bill, and sustained by the proof, will justify.⁵ When there is no

¹ *Jaques v. Methodist Church*, 1 Johns. Ch. R. 75; Story's Eq. Pl. §§ 36, 38.

² *Driver v. Fortner*, 5 Porter, 9.

³ Mitf. Eq. Pl. 133; 1 Barb. Ch. Pr. 40; Story's Eq. Pl. § 40. See *Gould v. Ryon*, 14 Ill. 53; *Kuchenbeiser v. Beckert*, 41 Ill. 172; *Curtis v. Goodenow*, 24 Mich. 18.

⁴ Barton's Suit in Eq. 46; Story's Eq. Pl. § 40-43; Hunter's Suit in Eq. 16, 18; *Thomason v. Smithson*, 7 Porter, 144; *McNab v. Heald*, 41

Ill. 326; *Raper v. Saunders*, 21 Gratt. Va. R. 60.

⁵ *Hobson v. McArthur*, 16 Pet. 182; *Gibson v. McCormick*, 10 Gill & J. 65; *Lingan v. Henderson*, 1 Bland, 236; *James v. Bird*, 8 Leigh, 510; *Danforth v. Smith*, 23 Vt. 247; *Brown v. McDonald*, 1 Hill Ch. R. 297; *Jones v. Bush*, 4 Harring. 1; *Kelley v. Payne*, 18 Ala. 371; *Stone v. Anderson*, 6 Foster, N. H. 596; *Gunnel v. Cockerill*, 84 Ill. 319.

obstruction to the particular relief prayed for, the complainant can not abandon it, and ask a different decree under the prayer for different relief.¹

It is never safe to omit the prayer for general relief, for if the complainant should mistake the relief to which he is entitled, in his special prayer, the court may, under the prayer for general relief, grant him such relief as he ought to have, consistent with the case made in the bill.² But if there is no prayer for general relief, then if the complainant should mistake the relief to which he is entitled, no other relief can be granted, and his suit must fail, at least, unless an amendment of the prayer is allowed.³

Under the general prayer for relief, the court will only grant such relief as the statements of the bill will justify, and will not ordinarily allow a bill framed for one purpose to answer for another; especially if the defendant may be surprised or prejudiced by it. If, therefore, the complainant has doubts as to the relief he ought to have, he should frame his bill with a double aspect, so that if the court should decide against him in one view of the case, it may yet afford him assistance in another.⁴

Michigan practice.—Chancery Rule 1, *b*, provides that the prayer of a bill shall be divided into paragraphs numbered consecutively, and shall specify the particular relief to which the complainant shall conceive himself to be entitled, and may also contain a prayer for general relief.

¹ *Allen v. Coffman*, 1 Bibb, 469; *Hilleary v. Hurdle*, 6 Gill, 105; *Kernegay v. Carroway*, 2 Dev. Ch. 403; *Pleasants v. Glasscock*, 1 S. & M. Ch. 17.

² *Wilkinson v. Beal*, 4 Mad. 408; *Beaumont v. Boulbree*, 5 Ves. 495; *Hiern v. Mill*, 13 Ves. 119, 120; *English v. Foxall*, 2 Pet. 595; *Hobson v. McArthur*, 16 Pet. 195; *Danforth v. Smith*, 23 Vt. 247; *Hilleary v. Hurdle*, 6 Gill, 105; *Scudder v. Young*, 25 Maine, 153; *Sheppard v. Starke*, 3 Munf. 29; *Stanley v. Valentine*, 79 Ill. 544; *Hopkins v. Snedaker*, 71 Ill. 449.

³ *Story's Eq. Pl.* § 14; *Cook v. Martyn*, 2 Atk. 2; *Polk v. Clinton*, 12 Ves. 62-65; *Thomason v. Smithson*, 7 Porter, 144.

⁴ *Story's Eq. Pl.* § 42; *Dan. Ch. Pr.* 434, 441; 1 *Hoff. Ch. Pr.* 49; *Mitf. Eq. Pl.* 38; *Coop. Eq. Pl.* 14; *Jones v. Parishes, etc.*, 3 *Swanst.* 208; *Legal v. Miller*, 2 Ves. 299; *Walker v. Devereaux*, 4 *Paige Ch.* 229; *Scudder v. Young*, 25 *Maine*, 153; *Colton v. Ross*, 2 *Paige Ch. R.* 396, and the cases there cited as to proper forms of prayer for relief.

SECTION XI.

IX. PRAYER OF PROCESS.

This part of the bill prays process to compel the defendant to appear and answer the bill, and abide the determination of the court on the subject. Care must be taken to insert the names of all persons who are intended to be made parties, for it is a general rule that none are parties, although named in the bill, against whom process is not prayed.¹ The first process prayed is a writ of subpœna,² which requires the defendant to appear and answer the bill on a certain day named in the writ. If the complainant wishes an injunction against the defendant, he must not only pray for it in the prayer for relief, but also in the prayer for process.³ A prayer for general relief will not be sufficient to authorize it.⁴ If only a temporary injunction is wanted, the bill must also contain a formal prayer for it.⁵

Not necessary in Michigan.—Chancery Rule 1, provides that the prayer for process heretofore common in a bill of complaint may be omitted, and the complainant shall be entitled to the process of subpœna on the filing of the bill of complaint, and to other process when ordered by competent authority.

SECTION XII.

FRAME OF A BILL.

We have now given the nine formal parts of an original bill praying relief, as it is generally framed; upon which Lord Redesdale has made the following remarks: "Some of them are not essential; and particularly it is in the discretion of the person who prepares the bill, to allege any pretense of the

¹ Barb. Ch. Pr. 37; Story's Eq. Pl. § 44; Coop. Eq. Pl. 16; *Fawkes v. Pratt*, 1 P. Wms. 593; *Windsor v. Windsor*, 2 Dick. 707; *Elmendorf v. Delaney*, Hopk. 555.

² *Peltier v. Peltier*, Har. Ch. 19.

³ 1 Barb. Ch. Pr. 37; *Wood v.*

Beadel, 3 Sim. 273; *Taylor v. Snyder*, Walk. Ch. 490.

⁴ Barb. Ch. Pr. 37; *Wright v. Atkins*, 1 Ves. & B. 314.

⁵ *Walker v. Devereaux*, 4 Paige Ch. R. 229.

defendant in opposition to the plaintiff's claims, or to interrogate the defendant specially. The indiscriminate use of these parts of a bill, in all cases, has given rise to a common reproach to practicers in this line, that every bill contains the same story, three times told. In the hurry of business it may be difficult to avoid giving ground for the reproach. But in a bill, prepared with attention, the parts will be found to be perfectly distinct, and to have their separate and necessary operation."¹

SECTION XIII.

SIGNING OF BILLS.

Except in cases where an injunction is asked for, or a discovery, or an answer on oath is required from the defendant, bills are usually signed by the solicitor alone and not by the party.² If the complainant sues in person, however, it must be signed by him. And in that case, it seems that it need not be signed by counsel.³ The general rule, however, is that the bill must be signed by counsel. And if it is not so signed, it will be, on motion, stricken from the files; or it may be demurred to for that cause, and a bill not signed in person by complainant, or not having the responsible signature appended, by himself or some authorized representative, may be stricken from the files. A printed signature is not good.⁴ Signing by counsel, on the back, is held sufficient.⁵

Chancery Rule 1 provides that the bill shall be signed by the complainant, or his agent, or solicitor.

The requirement that a bill in equity must be signed by counsel is obsolete in Michigan, where all solicitors are counselors, and a bill signed by solicitor is not demurrable for want of counsel's signature.⁶

¹ 1 Mitf. Eq. Pl. by Jeremy, 47; Story's Eq. Pl. § 46.

² *Hutch v. Eustaphie*, 1 Clarke, 63; 1 Barb. Ch. Pr. 43.

³ 1 Hoff. Ch. Pr. 97; 1 Barb. Ch. Pr. 44.

⁴ *Eveland v. Stephenson*, 45 Mich. 394; *Dillon v. Francis*, Dick. 68; *French v. Dear*, 5 Ves. 547; *Kirkley*

v. Burton, 5 Mad. 378; *Cary v. Hatch*, 2 Edw. Ch. R. 190; *Patridge v. Jackson*, 2 Edw. Ch. R. 520; Story's Eq. Pl. § 47; *Roach v. Hullings*, 5 Cranch, C. C. 637.

⁵ *Eveland v. Stephenson*, 45 Mich. 394; *Dwight v. Humphreys*, 3 McLean, 104.

⁶ *Henry v. Gregory*, 29 Mich. 68.

SECTION XIV.

SWEARING TO THE BILL.

Michigan practice.—Chancery Rule 2 provides that “the oath administered to the party shall be, in substance, that he has read the bill, or has heard it read, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be on his information or belief, and as to those matters he believes it to be true; and the substance of the oath shall be stated in the jurat.” Sworn bills may be verified by the oath of the complainant, or in case of his absence from the State, or other sufficient cause, shown by the oath of his agent, attorney or solicitor.

Where the verification is by agent who is not also solicitor, the jurat should describe the person verifying as agent; but where verification is by solicitor, the court will take notice of that fact from the records and proceedings in the cause.¹

While there is no rule in Michigan requiring bills in cases of general equity cognizance to be verified,² except where preliminary relief is sought,³ a bill seeking to have settled in equity, matters capable of enforcement at law, should be verified.⁴

A bill seeking to restore a mortgage, a discharge of which is alleged to have been procured by fraud, should be verified.⁵

If a bill seeks a discovery of deeds or writings, and prays relief, founded thereon, and the relief so prayed be such as might be obtained at law, if the deeds or writings were in the custody of the complainant, he must annex to his bill an affidavit that they are not in his custody or power, and that he knows not where they are, unless they are in the hands of the defendant, otherwise the bill will be demurrable.⁶ But if

¹ *Bergh v. Poupard*, Wal. Ch. 5.

² *Moore v. Cheeseman*, 23 Mich. 332; *Robinson v. Baugh*, 31 Mich. 290.

³ *Wardle v. Cummings*, 86 Mich. 395.

⁴ *Bernier v. Bernier*, 72 Mich. 43; *Lebanon v. Burch*, 78 Mich. 641.

⁵ *Beal v. Congdon*, 75 Mich. 77.

⁶ *Story's Eq. Pl.* §§ 288, 311, 477,

478; *Coop. Eq. Pl.* 125; *Looker v. Roll*, 3 Ves. 4; *Ryves v. Ryves*, 3 Ves. 343; and see *Russell v. Clarke*, etc., 7 Cranch, 69, 89; 1 *Story's Eq. Jur.* § 71; *Rootham v. Dawson*, 3 Anst. 859; *Whitchurch v. Golding*, 2 P. Wms. 541; *Humphreys v. Humphreys*, 3 P. Wms. 395; *Hook v. Dorman*, 1 Sim. & Stu. 227.

the relief sought extends merely to the discovery of the instrument, or is otherwise such as can only be given in a court of equity, such an affidavit is not necessary.¹

The general rule is that where the bill seeks an injunction it should be verified by affidavit. But where the bill is filed as a mere pleading, praying no preliminary relief, but only seeking an injunction at the hearing, it need not be sworn to.² It will not suffice to swear to the material facts upon information and belief. They should be positively sworn to.³ And where, upon an *ex parte* application for an interlocutory injunction, the complainant states the facts on which his equities rest upon information and belief, he should present affidavits of their truth from the persons of whom his knowledge is obtained, and who can swear positively to the facts.⁴ An exception, however, is recognized in the case of an injunction in aid of a creditor's bill against the judgment debtor alone, no third parties being joined as defendants, and in such case it is sufficient if the complainant swears upon information and belief as to the recovery of the judgment and return of execution *nulla bona*.⁵

SECTION XV.

PARTIES TO BILLS.

It can not be expected that in a condensed work of this kind, the important consideration as to who are proper and necessary parties to a bill can meet with an extended examination. This is a subject of great practical importance, and of no inconsiderable difficulty in a great variety of cases. The reader is referred to Chapter IV of Story's Equity Pleadings, 1 Daniell's Chancery Practice, Chapter V, and Barbour on Parties,

¹ Lord Red. Tr. Pl. 112, 113; 1 Mad. Ch. Pr. 26, 7, 197; *Whitchurch v. Golding*, 2 P. Wms. 541.

² High on Inj., § 984-987; *Robinson v. Baugh*, 31 Mich. 290.

³ *Campbell v. Morrison*, 7 Paige, Ch. R. 157; *Reboul's Heirs v. Behrens*, 5 La. An. 79; *Cutlett v. McDonald*, 13 La. An. 44.

⁴ High on Inj. § 984; *Campbell v. Morrison*, 7 Paige, Ch. R. 157; *Bank v. Skinner*, 9 Paige Ch. R. 305; *Youngblood v. Schamp*, 2 McCart. 42.

⁵ *Hamersley v. Wickoff*, 8 Paige Ch. R. 72; *Sizer v. Sizer*, 9 Paige Ch. R. 605; High on Inj. § 984-986.

where these authors have devoted a great deal of attention and a large space to the subject. A brief summary of the rules in relation to proper parties to proceedings in chancery is, however, indispensable, and will be given.

Who should be made parties.—In chancery, all the parties in interest, and whose rights may be affected, ought to be made parties to the bill; and if the court is called upon, in the exercise of its discretion, to dispense with the proper parties, some reason therefor ought to be disclosed in the bill.¹

Courts will take notice of the omission of proper defendants in the bill, though no demurrer be interposed, when it is manifest that the decree will have the effect of depriving them of their legal rights.² If the answer to a bill discloses an interest in a third person in the subject-matter of the suit, he should be made a defendant in the bill, that he may have an opportunity of defending his interests, which might otherwise be affected without a hearing.³ There are some exceptions to the general rule that all persons interested in the subject-matter in the suit should be made parties; but one general rule, however, governs all these exceptions, and that is, "that as the object of the rule is to accomplish the purpose of justice between all of the parties, and as it is a rule founded in some sort upon public convenience and policy, rather than upon positive principles of municipal or general jurisprudence, courts of equity will not suffer it to be applied so as to defeat the very purpose of jus-

¹ *Norris v. Hurd*, Walk. Chan. 102; *Suydam v. Dequindre*, Har. Ch. 347; *Beach v. White*, Walk. Ch. 495; *Wescott v. Mining Co.*, 23 Mich. 145; *Wheeler v. Bank*, Har. Ch. 449; *Ingersoll v. Kirby*, Wal. Ch. 65; *Bengeley v. Wheeler*, 45 Mich. 493; *Gilham v. Cairns*, Breese, 164; *Scott v. Moore*, 3 Scam. 306; *Martin v. Dryden*, 1 Gilm. 187; *Spear v. Campbell*, 4 Scam. 424; *Whitney v. Mayo*, 15 Ill. 251; *Prentice v. Kimball*, 19 Ill. 320; *Hoare v. Harris*, 11 Ill. 24; *Smith v. Rotan*, 44 Ill. 506; *Hassett v. Ridgley*, 49 Ill. 197; *Harris v. Carter*, 3 Stewart. 233; *Bank v. Seton*, 1 Pet. 299; *Story v. Livingston*, 13 Pet. 359; *Hussey v. Dole*, 24 Maine,

20; *McConnell v. McConnell*, 11 Vt. 290; *Crocker v. Higgins*, 7 Conn. 342; *New London Bank v. Lee*, 11 Conn. 112; *Hawley v. Cramer*, 4 Conn. 717; *Oliver v. Palmer*, 11 Gill & J. 426; *Park v. Ballentine*, 6 Blackf. 223; *Strong v. Downing*, 34 Ind. 300; *Hickenbotham v. Blackledge*, 54 Ill. 316; see, also, *Hunton v. Platt*, 11 Mich. 264; *Burpee v. Smith*, Wal. Ch. 327.

² *Payne v. Avery*, 21 Mich. 524; *Herrington v. Hubbard*, 1 Scam. 569; *Bohan v. Galloway*, 13 Ill. 75; *Prentice v. Kimball*, 19 Ill. 320.

³ *Herrington v. Hubbard*, 1 Scam. 569.

tice, if they can dispose of the merits of the case before them without prejudice to the rights or interests of other persons who are not parties; or if the circumstances of the case render the application of the rule impracticable, and if the persons thus interested are unknown to the complainant, or are exceedingly numerous, they need not be made parties.”¹

A person interested in the subject-matter of a suit in equity, refusing to join with the complainant, may be made a defendant, though his interest is with the complainant.² And if it appear to the court that a person who may be interested disclaims all interest in the controversy, he need not be made a party.³

How described.—Parties to suits in chancery should be described by their proper names, if known; if their names are unknown, they must be made parties in the manner prescribed by statute. Where a bill to foreclose a mortgage given by Alexander Eaton, Jr. to O. P. Ramsdell, was filed by Orrin P. Ramsdell against Alexander Eaton, and the bill was in usual form, but contained no direct averment that the parties to the suit were identical with the parties to the mortgage, it was held sufficient on *pro confesso*, as the question of identity would have been open to proof if disputed.⁴ Parties may be made to a bill under an averment that they have, or pretend to have, title to land; and if the charge in the bill is untrue, by disclaiming, they may obtain costs. Such parties, if there is no equitable ground of relief shown against them, should demur separately, not join in a general demurrer.⁵

Persons under disability.—Suits in chancery may be commenced and prosecuted by infants, either by guardian or next friend, and by conservators on behalf of the persons they rep-

¹ *Willis v. Henderson*, 4 Scam. 13; *Webster v. French*, 11 Ill. 254; *West v. Randall*, 2 Mason, 181; *Whitney v. Mayo*, 15 Ill. 252; *Robinson v. Smith*, 3 Paige Ch. R. 222; *Smith v. Rotan*, 44 Ill. 506; *Palmer v. Wood*, 48 Ill. App. 630.

² *Wales v. Newbould*, 9 Mich. 59; *Smith v. Sackett*, 5 Gilm. 534; *Whitney v. Mayo*, 15 Ill. 252; *Contee*

v. Dawson, 2 Bland, 264; *Pogson v. Owen*, 3 Desau. 31; *Cook v. Hadley Cooke*, 465; *Morse v. Hovey*, 9 Paige, Ch. R. 197.

³ *Johnson v. Rankin*, 3 Bibb, 86.

⁴ *Kirkham v. Justice*, 17 Ill. 107; *Ramsdell v. Eaton*, 12 Mich. 117.

⁵ *Hunton v. Platt*, 11 Mich. 264; *Finch v. Martin*, 19 Ill. 105.

resent. The suit must be in the name of the minor by his next friend or guardian.'

Interest of parties.—The bill must show that the complainant has an interest in the subject-matter in the suit; 'a mere contingent or possible interest, or probability of future title, is insufficient.'³ It must also be shown that the defendant has an interest, and is liable to answer to the complainant therefor.⁴ Parties having conflicting interests in the subject of litigation should not be joined as complainants in the suit.⁵

The statement showing the rights of the complainant, by whom and in what manner he is injured, or in what he wants the assistance of the court, and a prayer for relief suitable to his case, and for that purpose that the process of the court may issue to bring the defendants before it, form the substance and essence of every bill; and must not, by any means, be omitted.⁶

Want of proper parties, misjoinder, etc.—Where the want of proper parties, or a misjoinder, appears upon the face of the bill, advantage of it may be taken by demurrer or motion to dismiss, and this is the proper practice; where the want of parties does not so appear, a plea or answer setting up the fact is proper.⁷ The want of necessary parties is not, however, a ground for dismissal in the first instance; but if the complainant neglects or refuses to make the necessary parties, after

¹ See How. St. § 8124-9; *Hoare v. Harris*, 11 Ill. 24; *Holmes v. Field*, 11 Ill. 431; *Stewart v. Howe*, 17 Ill. 71.

² *Barstow v. Smith*, Wal. Ch. 394; *Moore v. Mandlebaum*, 8 Mich. 433; *Cummings v. Freer*, 26 Mich. 128; *Hanmontree v. Lott*, 40 Mich. 190; Mitf. Eq. Pl. 156-7; *Smith v. Hollenbeck*, 46 Ill. 252; *Kerr v. Watts*, 6 Wheat. 550; *Munsfield v. Hoagland*, 46 Ill. 359; see *Smith v. Hollenbeck*, 51 Ill. 223.

³ *Reid v. Vanderheyden*, 5 Conn. 719; *Austin v. Richardson*, 1 Gratt. 310; *Reeves v. Adams*, 2 Dev. Ch. 192; *Barbour v. Whitlock*, 4 Monr. 180; Mitf. Eq. Pl. 127; 1 Barb. Ch. Pr. 33.

⁴ *Att'y-Gen. v. Whorwood*, 1 Ves. Sr. 534.

⁵ *Grant v. Van Schoonhoven*, 9 Paige Ch. R. 255.

⁶ 1 Barb. Ch. Pr. 39; 1 Dan. 412; see *Elder v. Jones*, 85 Ill. 384; *Wilson v. Egleston*, 27 Mich. 257; *Torrent v. Rogers*, 39 Ibid. 85.

⁷ *Payne v. Avery*, 21 Mich. 538; *Prentice v. Kimball*, 19 Ill. 320; *Spear v. Campbell*, 4 Scam. 424; *Scott v. Bennett*, 1 Gilm. 646; *Story v. Livingston*, 13 Pet. 359; *Marston v. Humphreys*, 24 Maine, 513; *De la Vergne v. Everston*, 1 Paige Ch. R. 181; *Chipman v. Thompson*, Walker Ch. R. 405; but see *Bugbee v. Sargent*, 23 Maine, 269.

objection made, the bill will be dismissed,' without prejudice.* If the objection is not taken until the hearing, the court may order the case to stand over, on terms, with liberty to the complainant to amend, by adding such new parties as may seem to be necessary;³ but it can not be urged at the hearing, unless it is manifest that a decree can not be made without bringing other parties before the court.* If neither party raises the objection, it is competent for the court to go on and settle the rights of the parties before it, without prejudice to those who are not parties.⁵

If a party instead of demurring to a bill where the want of parties or a misjoinder appears upon the face of it, reserves the privilege of making the objection at the hearing, the court will at that stage of the case overrule the objection, unless the nature of the case be such that justice can not be done upon the evidence and pleadings as then presented.⁶

Joinder of parties.—The general rule in equity is, that several grievances must be redressed by several proceedings; the only recognized exception being where a single right is asserted on one side which affects all the parties on the other side in the same way, or a single wrong is complained of which falls on them all simultaneously and together. Familiar instances are rights in common which are resisted by owners of the estate on which it is charged, tax rolls assessing all parties on an equal ratio, and frauds by trustees affecting all the beneficiaries. If there is any distinction in the proportion or character of the several grievances, there can be no joinder.⁷

Where a tax is sought to be levied without authority, several

¹ *Singleton v. Gale*, 8 Porter, 270; *Knapp v. Marshall*, 26 Ill. 63; *Thomas v. Adams*, 30 Ill. 37.

² *Mims v. Mims*, 3 J. J. Marsh. 103; *Rowland v. Gorman*, 1 J. J. Marsh. 76; *Barry v. Rogers*, 2 Bibb. 304; *Wallace v. Hawley*, 4 J. J. Marsh. 622.

³ *Felch v. Hooper*, 20 Maine, 159; *Nash v. Smith*, 6 Conn. 421; *Miller v. McCan*, 7 Paige Ch. R. 451; *McLaughlin v. Van Keuren*, 21 N. J. Eq. R. 379.

⁴ *Reed v. Wessell*, 7 Mich. 139;

Cannon v. Norton, 14 Vt. 178; see *Woods v. Scott*, Id. 518; *R. R. Co. v. Rainey*, 7 Colw. Ten. 420; *De la Vergne v. Everton*, 1 Paige Ch. R. 181.

⁵ *Lorillard v. Coster*, 5 Paige Ch. R. 172.

⁶ *Payne v. Avery*, 21 Mich. 524.

⁷ *Winslow v. Jenness*, 64 Mich. 84; *Barker v. Vernon Township*, 63 Mich. 516; see *Walsh v. Varney*, 38 Mich. 73; *Bigelow v. Booth*, 39 Mich. 622; *Woodruff v. Young*, 43 Mich. 548; *Brunner v. Bay City*, 46 Mich. 236.

property owners, having a common interest in the subject, and asking relief against the same injury, on the same ground, may join in a bill to restrain its collection.¹ Several separate owners of distinct property interests, that are alike affected, may join as complainants, without the attorney-general, in a bill to enjoin the carrying on of a business in the vicinity of their dwellings in such a manner as to create a nuisance, where the grievance stated has one source, and operates in the same general manner against all.²

¹ *Schofield v. City*, 17 Mich. 437; *Harward v. Drain Co.*, 51 Ill. 130; *R. Co. v. Blanchard*, 54 Ill. 240; *Conwell v. Watkins*, 71 Ill. 488.
² *Robinson v. Baugh*, 31 Mich. 291; *Wales v. Newbold*, 9 Mich. 58; *Hunton v. Platt*, 11 Mich. 265.

CHAPTER V.

FORMS OF THE CONSTITUENT PARTS OF AN ORIGINAL BILL.

I. THE ADDRESS.¹

1. *In the Circuit Court of the United States.*

To the judges of the Circuit Court of the United States, for the District of ——— :

2. *In Michigan.*

To the Circuit Court for the County of ———, in Chancery.²

II. THE INTRODUCTION.³

3. *By a complainant under no disabilities.*

Your orator, A B, of the county of ———, respectfully represents unto the court that, etc.

4. *By an unmarried woman.*

Your oratrix, C D, of the county of ———, respectfully represents unto the court that, etc.

5. *By a married woman against her husband, or other person.*

Your oratrix, C D, wife of D D, of the county of ———, respectfully represents unto the court that, etc.

6. *By husband and wife.*

Your orator and oratrix, A B, and C B, his wife, of the county of ———, respectfully represent unto the court that, etc.

7. *By an infant by his father and next friend.*

Your orator, A B, of the county of ———, an infant under the age of twenty-one years, to wit, of the age of ——— years, by E B, of the same county, his father and next friend, respectfully represents unto the court that, etc.

8. *By an infant by his guardian.*

Your orator, A B, of the county of ———, an infant under the age of twenty-one, to wit, of the age of ——— years, by E F, of the same county, his guardian, respectfully represents unto the court that, etc.

¹ See *ante*, page 12.

² See *ante*, page 12.

³ See *ante*, page 12.

9. *By a corporation.*

Your orator, the — Company, a corporation duly established by the laws of the State of —, respectfully represents unto the court that, etc.

10. *In the Circuit Court of the United States.*

A B, of —, and a citizen of the State of —, brings this, his bill, against C D, of —, and a citizen of the State of —, and E F. of —, and a citizen of the State of —; and thereupon, your orator complains and says that, etc.¹

III. THE PREMISES OR STATING PART.²

11. That, etc. (*Here insert all the facts and circumstances of the complainant's case, and of the wrong or grievance complained of, and conclude stating part as follows:*) And your orator well hoped that no disputes would have arisen touching the said, etc., etc. (*stating the subject-matter*); but that the defendant would have complied with the reasonable request of your orator, as in conscience and equity he ought to have done.

IV. THE CONFEDERATING PART.

(*This part, as we have seen, may be omitted at the option of the pleader.*)³

12. But now so it is, may it please the court, that the said C D, combining and confederating with divers persons, (*or if there are several defendants, then thus:* combining and confederating with E F and G H, and with divers other persons; or, the said L M and N M, combining and confederating together, and with divers persons) at present unknown to your orator, whose names when discovered, your orator prays he may be at liberty to insert herein with apt words to charge them as parties defendant hereto, and contriving how to wrong and injure your orator in the premises, he, the said C D, absolutely refuses to comply with such request, and he at times pretends that, etc. (*Here follows the statement of the defendant's supposed ground on which he avoids the plaintiff's claim, and this should be matter disproved or traversed in the charging part of the bill.*)

V. CHARGING PART.

(*This part of the bill may also be omitted at the pleader's option.*)⁴

13. That the defendant sometimes alleges and pretends (*stating the supposed ground of the defendant*), and at other times he alleges and pretends, etc.; whereas, your orator charges the contrary thereof to be the truth, and that (*stating the special matter with which the plaintiff meets the defendant's supposed case.*)

VI. JURISDICTIONAL CLAUSE.

(*This clause may be omitted as unnecessary.*)⁵

14. All which actings, doings, and pretenses of the defendant (*or defend-*

¹ Rule 20 of the Rules of Practice for the U. S. Courts of Equity.

² See *ante*, page 13.

³ See *ante*, page 24.

⁴ See *ante*, page 24.

⁵ See *ante*, page 25.

ants) are contrary to equity and good conscience, and tend to manifest wrong, injury and oppression of your orator in the premises. In consideration whereof, and inasmuch as your orator is entirely remediless in the premises, according to the strict rules of the common law, and can only have relief in a court of equity, where matters of this nature are properly cognizable and relievable. To the end, therefore, etc.

VII. INTERROGATING PART.

*(In many cases this part is unnecessary.)*¹

15. To the end, therefore, that the said C D, and the rest of the confederates, when discovered, may, upon their several and respective corporal oaths, full, true, direct and perfect answers make to all and singular the matters hereinbefore stated and charged *(or to all and singular the premises, or, to all and singular the charges and matters aforesaid.)* as fully and particularly as if the same were hereinafter repeated, and they thereunto distinctly interrogated *(or as fully in every respect as if the same were here again repeated, and they thereunto particularly interrogated)*; * and that not only as to the best of their respective knowledge and remembrance, but also as to the best of their several and respective information, hearsay and belief *(or, according to the best of their respective knowledge, information and belief)*; and more especially, that they may answer and set forth:

1. Whether, etc. *(Here follow interrogatories, to be answered by the defendant.)*

2. Whether, etc.

VIII. PRAYER FOR RELIEF.

16. *(After the interrogating part.)* And that the defendant may come to a fair and just account, etc. *(Here state the particular relief asked)*; and that your orator may have such further and other relief in the premises as the nature of his case shall require, and to the court shall seem meet,

IX. PRAYER OF PROCESS.

17. *Prayer for subpœna.*²

May it please the court to grant unto your orator the writ of subpœna, to be directed to the said C D, and the rest of the confederates when discovered, thereby commanding them, and every of them, at a certain day and under a certain penalty, therein to be specified *(or, therein to be inserted)*, personally to be and appear before this honorable court, and then and there to answer all and singular the premises, and to stand to, perform and abide such order and decree therein, as to the court shall seem meet.

18. *Prayer for injunction.*

(After the prayer for subpœna, as in the last form, add the following):

And may it please the court to grant unto your orator the people's writ

¹ See *ante*, page 25.

² Chan. Rule 1 provides that the

* The remainder from the star is prayer for process may be omitted, usually omitted in Michigan.

of injunction, to be directed to the said C D, restraining him, etc., (*here insert the matter sought to be enjoined*), until the further order of said court.

2. *Oath to bill or petition.*

STATE OF MICHIGAN, }
County of _____ } ss.

On this _____ day of _____, A. D. 18—, before me personally came the above named A B, and made oath, that she has read (or heard read), the foregoing bill of complaint by her subscribed, and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters therein stated to be on information and belief, and as to those matters she believes it to be true.¹

C D, Notary Public, _____ Co., Mich.

Bill must be paragraphed.—Rule 1 of the Chancery Rules of Michigan, provides that every bill of complaint shall be divided into paragraphs, numbered consecutively; that each paragraph shall contain, as near as may be, a separate and distinct allegation; and that the prayer of every bill shall also be divided into paragraphs numbered consecutively, and shall specify the particular relief to which the complainant shall conceive himself entitled, and may also contain a prayer for general relief.

Said rule further provides that a bill which shall not comply with the rule in relation to paragraphs shall be stricken from the files on motion, unless the court shall deem it proper to allow amendments thereto to cure the defect.

¹ Chan. Rule 2.

CHAPTER VI.

PROCESS FOR APPEARANCE.

- Section 1. SUBPŒNA.
2. SERVICE AND RETURN.
3. NOTICE BY PUBLICATION.
4. SERVICE BY COPY OF ORDER.
5. ACCEPTANCE OF SERVICE.
6. ATTACHMENT.

SECTION I.

SUBPŒNA.

Upon filing the bill of complaint in the office of the register in chancery, a chancery subpœna signed by the register, issues, under the seal of the court, tested and dated of the day of issue.

It is necessary that the names of all the defendants in the cause be inserted in the subpœna.¹ The Supreme Court of Michigan has, by statute,² power to prescribe, from time to time, the form of all process to be issued out of the circuit courts in chancery and accordingly the following rule has been adopted to stand as Chancery Rule 4:

“The subpœna in a suit in chancery shall notify the defendant that a bill of complaint has been filed against him by the complainant (naming him) and that if he desires to defend the same he is required to cause his appearance to be filed or entered in the cause in accordance with the rules and practice of the court, in person or by solicitor, within fifteen days after service of the subpœna upon him, and the return day thereof shall be indicated at the foot of the subpœna, and there shall be an underwriting designating against what defendant, if any, a personal decree is asked. The business address of the complainant’s solicitor shall appear upon the subpœna.”

¹ Chan. Rule 4; *Richardson v. Thompson*, 41 Ill. 202.

² How. Stat. § 6623.

"All process, unless otherwise directed, shall be made returnable on a day certain (except Sunday), either in vacation or in term, not less than ten days from the issuing thereof; and if process is not executed on or before the return day, further process may be taken out of course as often as may be necessary.¹"

The object of the underwriting required is to save defendants the necessity of looking into the record, which usually involves the employment of counsel, unless notified that special relief would be sought against them; and the complainants must see to it that the defendants are not misled, and are responsible for the correctness of their process.²

No. 3. *Form of Chancery Subpoena.*

STATE OF MICHIGAN,
The Circuit Court for the County of ——— } ss.
In Chancery.

SUBPOENA.

In the Name of the People of the State of Michigan: To C. D., etc.
Greeting:

You are hereby notified that a bill of complaint has been filed against you in the circuit court for the county of ———, in Chancery, by A. B., as complainant—, and that if you desire to defend the same you are required to have your appearance filed or entered in the cause, in accordance with the rules and practice of the court, in person or by solicitor, within fifteen days after the service of this subpoena upon you. Hereof fail not under the penalty of having said bill taken as confessed against you. The return day of this writ is the ———, day of ———, A. D. 189—.

Witness, the Hon. E. F., Circuit Judge, at ———, this ——— day of ———, in the year of our Lord one thousand eight hundred and ———.

..... Register.
..... Deputy Register.

Underwriting: A personal decree is sought against the defendants C. D., etc., and the bill is filed to reach interests in property, and not to obtain any further relief against the remainder of the defendants.

..... Solicitor for Complainant.
Business address

¹ Chan. Rule 4; see How. Stat., §§ 6630, 6631; *Anderson v. Birce*, 3 Mich. 280; *Peck v. Cavell*, 16 Mich. 9; *Fisher v. Kyle*, 27 Mich. 454; *Hemens v. Bentley*, 32 Mich. 89; *Torrans v. Hicks*, 32 Mich. 307.

² *Vaughn v. Black*, 63 Mich. 215; see *Howe v. Lemon*, 37 Mich. 164; *Mickle v. Maxfield*, 42 Mich. 304; *McCricket v. Wilson*, 50 Mich. 513; *Corning v. Burton*, 102 Mich. 86; see *Seebly v. Ingham*, 105 Mich. 584.

The constitution and statute require that all process shall be in the name of the People of the State of Michigan,¹ and the omission of the words is fatal to the validity of the process.²

All process must be tested in the name of one of the judges of the court from which it issues.³

The subpoena is the first process, and it is irregular to have an injunction or *ne exeat* issued and served before the issue of subpoena.⁴ But when a party appears and answers, all objections to the regularity of proceedings to bring him into court, must be considered as waived.⁵

SECTION II.

SERVICE AND RETURN OF SUBPŒNA.

The service of a chancery subpoena may be made anywhere within the State, on or before the return day. It may be served by the sheriff of any county or by any other person, and it is served "by delivering a copy of the writ, subscribed by the complainant, his solicitor, or the officer or person serving the same, and inscribed 'copy,' and showing the original, under the seal of the court, at the time of such delivery to the defendant."⁶ The service may be had on or before the return day mentioned in the subpoena.⁷ Service had out of the State is irregular,⁸ but service upon the keeper of a prison where the defendant is confined is sufficient.⁹ The copy of the subpoena must not vary from the original, or the service will be set aside as irregular.¹⁰ Service can not be made upon Sunday, or upon a legal holiday.¹¹

¹ Const. Art. VI, § 35; How. St. § 7290.

² *Forbes v. Darling*, 94 Mich. 621; *Johnson v. Ins. Co.*, 12 Mich. 216;

³ How. St. § 7290.

⁴ Har. Ch. 29; *Parker v. Williams*, 4 Paige, 439; *Attorney-General v. Nichol*, 16 Ves. 388.

⁵ *Stone v. Welling*, 14 Mich. 514.

⁶ How. Stat. §§ 7300, 7293, 6630, 6608; Chan. Rule, 4; *Anderson v. Birce*, 3 Mich. 280; *Peck v. Cavell*, 16 Mich. 9; *Fisher v. Kyle*, 27 Mich.

454; *Hemmens v. Bently*, 32 Mich. 89; *Torrans v. Hicks*, 32 Mich. 307; *Soule v. Hough*, 45 Mich. 422.

⁷ Chan. Rule 4.

⁸ *Pratt v. Bank*, Har. Ch. 254; *Dunn v. Dunn*, 4 Paige, 425.

⁹ *Johnson v. Johnson*, Walk. Ch. 309; *Joyce v. Joyce*, 1 Hogan R. 121.

¹⁰ *Gould v. Tryon*, Walk. Ch. 339; 1 Edw. Ch. 631.

¹¹ *Anderson v. Birce*, 3 Mich. 280, and citations, note b.

Return.—In all cases the return of service should inform the court that lawful service has been made.¹ It should show the time when, the place where, upon whom and how the service was made.² A sheriff's return must name his county, and it must show service in that county.³ The service must be made strictly in accordance with the statute, and so shown, or the court will not have jurisdiction of the person, unless appearance is entered by him in the case,⁴ and if the service is insufficient to confer jurisdiction, the decree, when defendant has not appeared, may be questioned in a collateral proceeding,⁵ for it is a nullity.

It was held in an early Michigan case,⁶ that where the statute required service by reading to defendant and delivering to him a copy, a return, "served the within by reading personally," conferred no jurisdiction. In Illinois, where the first chancery process is a summons, and where the statute requires the delivery of a copy as an essential part of the service, a return reading "this writ personally served by delivering copies of the same to the within named defendants," has been held to be sufficient.⁷ But a return of service, "on the within named defendant," not giving the name, there being two defendants named in the summons, is insufficient.⁸

Where service is by summons, parol evidence will not be heard to prove or to aid it. It is otherwise when it is by publication.⁹

If the return of the officer does not show the date of the service, but the decree recites "that the defendants were duly served," such recital was held to cure the defect in the return.¹⁰

So far as the return of service is concerned, the subpoena

¹ *Town v. Tabor*, 34 Mich. 262.

² *Ball v. Shattuck*, 16 Ill. 299; *Wilson v. Greathouse*, 1 Scam. 174, 176; *Bellingall v. Gear*, 3 Scam. 575; *Miller v. Handy*, 40 Ill. 448.

³ *Clark v. Lichtenberg*, 33 Mich. 307.

⁴ *Campau v. Fairbanks*, 1 Mich. 152; *Cost v. Rose*, 17 Ill. 276; *Boyland v. Boyland*, 18 Ill. 551; *Miller v. Mills*, 29 Ill. 431; *Fisher v. Fisher*, 54 Ill. 231.

⁵ *Smalley v. Lighthall*, 37 Mich.

350; *Botsford v. O'Conner*, 57 Ill. 72; *Hochlander v. Hochlander*, 73 Ill. 618; see *McNab v. Young*, 81 Ill. 11.

⁶ *Campau v. Fairbanks*, 1 Mich. 151.

⁷ *Barnes v. Hazelton*, 50 Ill. 429; *Greenman v. Harvey*, 53 Ill. 386; *Martin v. Hargardine*, 46 Ill. 322; *Hedges v. Mace*, 72 Ill. 472.

⁸ *Richardson v. Thompson*, 41 Ill. 202; *Whitman v. Fisher*, 74 Ill. 147.

⁹ *Botsford v. O'Conner*, 57 Ill. 72.

¹⁰ *Rivard v. Gardner*, 39 Ill. 125.

and the underwriting are treated as one instrument, and a return of service of the subpoena is sufficient to show service of both.¹

If the officer fails to return any process on or before return day, any party interested may cause a rule to be entered requiring such officer to serve such process within five days after service of notice of the rule, and if the same is not returned within that time an attachment may be issued against such officer to compel such return.²

No. 4. Form of Officer's Return.

STATE OF MICHIGAN, {
County of ———, } ss.

I hereby certify and return, that on, etc., I served the within subpoena personally on C D, etc., by delivering to said defendant, at ———, in said county, a true copy of the within subpoena, inscribed "COPY," and subscribed ———, complainant's solicitor; and at the same time I showed said C D, defendant, the original subpoena, with the seal of the court impressed thereon.

Dated this — day of —, 188 .

My fees —; Service, \$——.

Travel, —.

Copies —. Total, \$——.

Sheriff.

Where service is made by other than the sheriff, or his deputy, within his county, proof of service must be made by affidavit, attached to the writ, and filed with the register of the court. The affidavit should be substantially as follows:

No. 5. Form of Affidavit of Service.

STATE OF MICHIGAN, {
County of ———, } ss.

A B being duly sworn, deposes and says that he resides in the ——— of ——— county and State aforesaid, and that on the — day of — A. D. 188—, he served the within subpoena personally on C D, defendant, by delivering to him at ———, in said county, a true copy of the within subpoena, inscribed "copy," and subscribed ———, complainant's solicitor; and at the same time he showed said defendant the original subpoena, with the seal of the court impressed thereon; and further deponent says not.

A B.

Subscribed and sworn to before me, {
this — day of —, A. D. 188 . }

C D.

Notary Public.

— Co., Mich.

¹ *Corning v. Burton*, 102 Mich. 86.

² Chan. Rule, 15; Law Rule, 43.

SECTION III.

NOTICE BY PUBLICATION.

It is provided by statute¹ that "after the filing of a bill, the Circuit Judge, or Circuit Court Commissioner shall make an order for the appearance of a defendant, at a future day therein to be specified, as hereinafter directed in the following cases.

First. When the defendant resides out of this State, upon proof by affidavit of that fact.

Second. When the defendant is a resident of this State, upon proof by affidavit that the process for his appearance has been duly issued, and that the same could not be served by reason of his absence from, or concealment within this State, or by reason of his continued absence from his place of residence.

Third. When it can not be ascertained in what State or country the defendant resides, upon proof thereof by affidavit." The order shall require the defendant to appear and answer as follows :

First. If a resident of this State, in not less than three months.

Second. If a resident of some other of the United States, or of one of the territories thereof, or of the British Provinces of North America, in not less than four months.

Third. If a resident of any other State or country not before mentioned, or if he has departed from his last known place of residence, and his residence can not be ascertained, or if it can not be ascertained in what State or country he resides, in not less than five months from the date of making such order.²

Within twenty days after the order is made it must be published in some newspaper printed in the county, or in such other paper as the court may direct, once in each week for six weeks in succession. But such publication is not necessary in any case in which a copy of the order shall have been served upon such absent, concealed or non-resident defendant, per-

¹ Pub. Acts, 1885, pp. 123-4; How. St. Sup. § 6670; see *Soule v. Hough*, 45 Mich. 418.

² Pub. Acts 1885, p. 124; How. St. Sup. § 6671.

sonally, at least twenty days previous to the time prescribed for his appearance.¹

The principle is well settled in this State, that the statute authorizing substituted service of process must be strictly complied with, in order to confer jurisdiction upon the court over the property of the defendant which the suit is instituted to reach and subject to the payment of his debt; and it has been held that the affidavit required must show every fact necessary to give the officer jurisdiction to make the order for appearance.²

An order of publication against a non-resident defendant, must be based upon facts existing at the time it is made, and is defective if grounded upon an affidavit made several days before.³

The publication of an order for the appearance of a non-resident defendant, is rendered unnecessary by his appearance, by solicitor, after the order is granted.*

Courts will not permit jurisdiction of non-residents to be acquired by fraud, either in procuring personal or constructive service of its process.⁵

Essentials of the affidavit.—The affidavit which is required by the statute, and upon which the order for appearance is based, should be carefully prepared, and should clearly state the fact of the non-residence or otherwise of the defendant, and the grounds upon which the order of appearance is asked. Both the affidavit, and the order, as well as the proof of publication that must be filed in the case, must strictly conform to all the statutory requirements. The affidavit is an essential prerequisite to an order for appearance, and the recital of an affidavit in the order is not evidence that such an affidavit was made.⁶

It has been held that where the defendant is brought in by publication, the question of the validity of the chancery subpoena, which was issued and returned not served, is not involved,

¹ How. Stat. § 6672.

² *Colton v. Rupert*, 60 Mich. 319; *Platt v. Stewart*, 10 Mich. 260; *King v. Harrington*, 14 Mich. 532; *Morrison v. Morrison*, 64 Mich. 53.

³ *Union v. Atwell*, 95 Mich. 239.

⁴ *Long v. Long*, 59 Mich. 296; *ante*, 57-58.

⁵ *Copus v. Provision Co.*, 73 Mich. 541.

⁶ *Platt v. Stewart*, 10 Mich. 260.

where the order of publication is based upon sufficient showing by affidavit; and the fact that the subpoena was prematurely returned is unimportant.¹

The case referred to was a foreclosure suit, and the defendant was proceeded against as a resident upon whom service could not be made by reason of his absence from the State. The affidavit was made by the complainant's solicitor upon his own knowledge that the defendant was a resident of the county, but had been absent some four months, and it stated that the subpoena could not be served by reason of defendant's absence from the State. The court held that this showing was sufficient to warrant an order of publication without any attempt being made to serve the subpoena.

The better practice is to have process regularly issued, held until the return day by the officer, and due diligence shown by his return in endeavoring to secure service. And in the case of *Soule v. Hough*, 45 Mich. 420, it has recently been held by the Supreme Court of Michigan, that "the process must be issued and diligent efforts made to serve it during its entire time of service, and there must be a responsible showing why it was not served." Judge Cooley dissented. See in this connection the case of *Pettiford v. Zoelener*, 45 Mich. 358.

Publication and proof of same.—The publication stands in lieu of personal summons,² and where there is no personal service, the publication of notice is necessary to enable the court to obtain jurisdiction; and no judgment is valid without it. It has always been required in special proceedings against parties not served or appearing, that the substituted service shall be strictly regular under the statutes.³

When there are several parties all of them should be named in entitling the affidavit.⁴

¹ *Torrans v. Hicks*, 32 Mich. 309.

² *Thompson v. Thomas*, 11 Mich. 274.

³ *King v. Harrington*, 14 Mich. 533;

see *Brown v. Phillips*, 40 Mich. 264; *Soule v. Hough*, 45 Mich. 420.

⁴ *Arnold v. Nye*, 11 Mich. 456.

No. 6. Affidavit for order of appearance—non-residence of defendant—stating place of residence.

STATE OF MICHIGAN.

The Circuit Court for the County of _____

In Chancery.

A B,
Complainant, }
v.
C D and E F, }
Defendants. }

_____ County, ss.

A B, the above named complainant, being duly sworn, deposes and says, that E F, one of the above named defendants, is not a resident of this State, but resides in, etc. (inserting the place of residence.) A B.

Subscribed and sworn to before me, }
this _____ day of _____ A. D. 18____ }

G H,

Notary Public _____ County, Michigan.

No. 7. Affidavit for publication—Non-residence of defendants—Place of residence not known.

(State the venue and title of cause, as in above form.) A B, the above named complainant, on oath states that the above named defendants, C D and E F, are not residents of this State; affiant further states that he has made diligent inquiry to learn their place of residence, and has been unable to ascertain the same. A B.

Subscribed, etc.

No. 8. Affidavit for publication—That the defendant can not be found.

(State the venue and title of cause, as in No. 6, above.) A B, the above-named complainant, on oath states that he has made due inquiry to learn the place of residence of the said defendants, C D and E F, and is unable to ascertain the same. Affiant further states that the last known place of residence of the said defendants was in _____, in this State which place they left about _____ years ago, since which time this affiant has been unable to obtain any information as to their residence, although he has made inquiries of the former neighbors and acquaintances of the said defendants, and of such of their known relatives as would be likely to be knowing to their place of residence. A B.

Subscribed, etc.

No. 9. Affidavit for publication—That the defendant is concealed within this State.

(State the venue and title of cause, as in No. 6, ante.) A B, the above-named complainant, on oath states that the above-named defendant, C D, resides in _____ in this State; and that he is concealed within this State. so that process can not be served upon him. Affiant further states that, etc. (Here state the circumstances which induce a belief that the defendant is concealed.) A B.

Subscribed, etc.

No. 10. Order of appearance, or publication.

STATE OF MICHIGAN.

— Judicial Circuit.—In Chancery.

A B, vs. C D and E F,	}	Complainant, Defendants.	Suit pending in the Circuit Court for the County of ——. In Chancery, at —, on the — day of —, A. D. 18—.
-----------------------------	---	---------------------------------	---

In this cause, it appearing from affidavit on file, that the defendant E F is not a resident of this State, but is a resident of ——. On motion of complainant's solicitor, it is ordered that the appearance of said non-resident defendant, E F, be entered herein, within — months from the date of this order; and in case of his appearance he cause his answer to the bill of complaint to be filed, and a copy thereof to be served on the complainant's solicitor, within twenty days after service on him of a copy of said bill and notice of this order; and in default thereof, said bill will be taken as confessed by said non-resident defendant. And it is further ordered, that within twenty days the complainant cause a notice of this order to be published in the —, a newspaper printed, published and circulating in said county, and that said publication be continued therein, once in each week, for six weeks in succession, or that he cause a copy of this order to be personally served on said non-resident defendant at least twenty days before the time above prescribed for his appearance.

M N,

Circuit Court Commissioner,

— Co., Mich.

(or Circuit Judge.)

K L,

Complainant's Solicitor.

The following order is briefer, and at the same time it seems to contain all that the statute and rules of practice require, while the printer's bill will be less:

No. 11. Short form order of publication.

STATE OF MICHIGAN.

— Judicial Circuit, in Chancery. Suit pending in Circuit Court for county of —, in Chancery, at — on the — day of —, A. D. 18—. A B, complainant, v. C D and E F, defendants. In this cause it appearing that defendant E F is a resident of this State, but his whereabouts are unknown, therefore, on motion of —, solicitor for complainant, it is ordered, that defendant enter his appearance in said cause on or before — months from the date of this order, and that within twenty days the complainant cause this order to be published in the —, said publication to be continued once in each week for six weeks in succession.

—, —,

Circuit Judge,

(or Circuit Court Commissioner.)

—, —,

Solicitor for Compl't.

The affidavit of publication must state positively the fact of publication. The affidavit should be made by the printer or publisher of the newspaper in which the order has been published, or by some person employed in the office of the paper, who can swear positively to the fact of publication, of his employment on the paper, and that the facts stated are of his own knowledge.¹ An order of appearance is an adjudication that the statutory cause exists.²

SECTION IV. .

SERVICE BY COPY OF ORDER OF APPEARANCE.

As previously stated, the statute provides that an order of appearance need not be published, provided the complainant shall serve or cause to be served upon such absent, concealed or non-resident defendant, at least twenty days previous to the time prescribed for his appearance, a copy of the order.³ The correctness of the copy should be certified to by the register of the court. The service of a copy of the order is proved by the affidavit of the party making the service in substantially the following form :

No. 12. Proof of service of order of appearance.

(*State title of cause and venue, as in No. 6.*) I J, being duly sworn, deposes and says that he resides in the town of ——. County of ——, and State of Michigan; that he knows the above named defendant, and that upon — the — day of —, A. D. 18 —, he served a true and certified copy of an order, of which the annexed is also a true and certified copy, upon the said defendant by delivering the same to him personally, at the — of —, County of —, in said State.

I J.

Subscribed, etc.

Decrees rendered under service of an order of appearance, are said to be only binding in this State, or on residents thereof.⁴

¹ *Pettiford v. Zoellner*, 45 Mich. 358; *Brown v. Phillips*, 40 Mich. 264.

² *Adams v. Cir. Judge*, 98 Mich. 51.

³ How. Stat., § 6672.

⁴ *Bishop v. Withered*, 9 Wal. U. S. R. 814; *Tel. Co. v. P. & A. Tel. Co.*, 49 Ill. 94; *Cooley on Const. Lim.*, 403.

SECTION V.

ACCEPTANCE OF SERVICE.

Law Rule 40 which is also applicable to chancery causes,¹ provides that when a defendant accepts or acknowledges in writing the service of any process, pleading or notice, and an affidavit is filed therewith, showing the genuineness of his signature, the same shall have the same effect as a return or other legal proof of service.

A written acceptance of service must be accompanied by proof of the authenticity of the signature to authorize the entry of default.²

Where an acceptance of service purports to be made on behalf of a corporation, proof of the agency must be filed.

SECTION VI.

ATTACHMENT.

Appearance was formerly absolutely necessary in every case, before any decree could be rendered against a defendant. Where the defendant did not voluntarily obey the injunctions of the writ by entering his appearance on its return, a long chain of process was resorted to, ending in a sequestration of his property, for the purpose of compelling an appearance.³ There were many cases, however, in which the complainant had no effectual remedy; as where the defendant could not be served with process at all; or where, notwithstanding the commitment of his person, and the sequestration of his property, he persisted in refusing to appear and put in his answer. To make the process of the court more effectual, there are various statutory enactments, both in England and the different States of this country, providing for a decree *pro confesso*, founded upon the statements of the complainant's bill. The process for effecting a compulsory appearance has fallen into comparative disuse since the passage of these statutes.⁴

¹ See Chan. Rule 15.

² *Johnson v. Delbridge*, 35 Mich. 436; *Allured v. Vollner*, 65 N. W. Rep. 286; 107 Mich. 576.

³ *Barton's Suit* in Eq. 85, 86, 87, 88.

⁴ *Ibid.* 83, 84.

In ordinary cases, where the oath of the defendant is waived, the complainant will not necessarily require an answer, but will seek to obtain a decree by default. But where the object of the bill is to obtain a discovery, as in a creditor's bill and the like, where an answer under oath is requisite, and the defendant fails to put in an answer, further steps must be taken to procure an answer.

Under the statute of Michigan allowing parties to become general witnesses, a bill for discovery is no longer needed and will not lie.¹

Section 6633 How. Stat. provides that when a defendant, brought into court by writ of *habeas corpus*, or other process, shall neglect or refuse to enter his appearance according to the rules of the court, the court shall order his appearance to be entered, and the suit shall then proceed, as if the party had actually appeared.

¹ *Riopelle v. Doellner*, 26 Mich. 102; *Sheldon v. Walbridge*, 44 Mich. 251.

CHAPTER VII.

TAKING BILLS AS CONFESSED.

- Section 1. PROCEEDINGS FOLLOWING SERVICE OF SUBPENA.
2. DEFAULT.
3. RIGHTS OF DEFENDANT AFTER DEFAULT.
4. SETTING ASIDE A DEFAULT.
5. SETTING ASIDE DECREE WHERE DEFENDANT IS NOT PERSONALLY NOTIFIED.

SECTION I.

PROCEEDINGS FOLLOWING SERVICE OF SUBPENA.

Chancery Rule 5 provides, that after the service of a *subpœna* a defendant desiring to defend a cause, or have notice of the proceedings therein, must cause notice of his appearance to be filed or entered in the office of the register of the court, within fifteen days after the service of the *subpœna* upon him, and within the same time serve notice of such appearance upon the complainant's solicitor.

Such appearance which entitles him to notice of all further proceedings in the cause, whether followed by answer or not, may be in substance as follows:

No. 13. Notice of appearance.

STATE OF MICHIGAN.

The Circuit Court for the County of ———, in Chancery.

A B,
Complainant, }
vs. }
C D,
Defendant. }

To —————

Solicitor for Complainant.

Take notice that the defendant ————— hereby appears in the above-entitled cause and demands a copy of the bill of complaint therein.

Solicitor for said defendant.

Dated —————

Business address —————

Ex parte proceedings without notice to a defendant who has appeared are void.¹

Rule 5 further provides that the complainant shall cause a copy of the bill of complaint to be served on the solicitor so appearing, within fifteen days after receiving said notice and demand; but he need not serve more than one copy on any one solicitor, although such solicitor may appear at different times for more than one defendant.

After the defendant receives a copy of the bill he must plead, answer or demur thereto within fifteen days;² but for good cause shown, on special motion, after notice to the opposite party, the judge, or in his absence from the county, a commissioner, may extend the time for putting in or serving any pleading, or for taking any other step which is required to be done within a limited time.³

SECTION II.

DEFAULT.

If either party makes default in filing or serving any pleading or notice within the time limited by the rules or special order of the court, the opposite party may have the default entered in the common order book, or filed, in vacation or term time.⁴

Default of complainant.—If the complainant fails to serve a copy of the bill of complaint, the defendant may, on filing an affidavit of the service of the required notice, and showing the defendant's neglect, enter or file, an order dismissing the bill.⁵

No. 14. Affidavit of failure of complainant to serve a copy of bill, after motion and demand.

(Title of court, cause and venue as in No. 6.) E F, solicitor for defendant, being duly sworn deposes and says, that upon the —— day of —— A. D. 18—, being within fifteen days after the service of the *subpœna* upon him, the above-named defendant caused notice of his appearance in the above entitled cause to be filed or entered in the office of the register of this court, and at the same time caused notice of such appearance, together with a demand for a copy of the bill of complaint herein, to be served upon

¹ *Cook v. French*, 96 Mich. 525.

² Chan. Rule 5.

³ Chan. Rule 6.

⁴ Chan. Rule 7.

⁵ Chan. Rule 7.

the complainant's solicitor. Deponent further says that more than fifteen days have elapsed since the receipt by complainant of said notice and demand, and that said complainant has not caused a copy of the said bill of complaint to be served upon this deponent, as solicitor for said defendant as aforesaid.

Subscribed, etc.

E F.

Default of defendant.—If the defendant has failed to appear or to plead, answer or demur, the complainant may enter or file an order taking the bill of complaint as confessed, and referring the cause to a commissioner or the court for proofs.¹

No. 15. Affidavit of non-appearance.

(*Title of court, cause and venue as in No. 13.*) E F, solicitor for the above-named complainant, being duly sworn, deposes and says that the bill of complaint was filed in said cause upon the — day of — A. D. 18—, and that upon the same day a chancery *subpœna* was issued, returnable on the — day of — A. D. 18—, and that upon the — day of — A. D. 18—, said *subpœna* was personally served upon defendant, as will more fully appear by reference to proof of service now on file in said cause. Deponent further says that more than fifteen days have elapsed since the return day of said *subpœna*, and that said defendant has not entered his appearance in said cause, or caused the same to be entered.

Subscribed, etc.

E F.

Good practice requires an affirmative showing of the non-appearance of the defendant as a preliminary to an order *pro confesso*.²

While good practice may require the filing of an affidavit of non-appearance in a chancery case before entering an order *pro confesso* for want thereof, yet it is not essential, and its omission is not error. If entered, the record in the case must disclose the fact.³

No. 16. Affidavit on default.

(*Title of court, cause and venue as in No. 6.*) E F, solicitor for complainant, being duly sworn, deposes and says, that upon the — day of — A. D. 18—, the above named defendant entered his appearance in said cause by G H, his solicitor, and at the same time demanded a copy of the bill of complaint, filed in said cause. Deponent further says, that upon the — day of — A. D. 18—, he served a true copy of said bill of complaint upon the said G H, solicitor for defendant, by delivering the same personally to said G H. Deponent further says, that more than twenty days have

¹ Chan. Rule 7.

² *Low v. Mills*, 61 Mich. 36.

³ *Eaton v. Eaton*, 33 Mich. 305.

elapsed since said service of said copy of said bill of complaint as aforesaid, and said defendant has not pleaded, answered or demurred to the same.

Subscribed, etc.

E. F.

No. 17. Affidavit of regularity.¹

(*Title of court, cause and venue as in No. 6.*) E F, solicitor for the above named complainant, being duly sworn, deposes and says that the bill of complaint was filed in said cause on the — day of — A. D. 18—, for the purpose of (*here state general purpose of bill*); that said bill has been taken as confessed by the said defendant, and that all proceedings to take said bill as confessed have been regular and according to the rules and practice of this court.

E F.

Subscribed, etc.

No. 18. Order pro confesso and of reference.

STATE OF MICHIGAN.

The Circuit Court for the County of —. In Chancery.

A B,	}
Complainant,	
vs.	
C D,	
Defendant.	

On filing due proof of personal service of the *subpœna* issued in this cause on the defendant, C D, therein, on or before the return day thereof, and more than twenty days having elapsed since said return day, and said defendant, C D, not having appeared, on motion of E F, solicitor for the complainant, it is ordered that the bill of complaint filed in this cause be, and the same hereby is taken as confessed by the said defendant, C D, and that it be referred to I J, Esq., a circuit court commissioner, to take proofs of the facts and circumstances stated in said bill, and that said commissioner, with all convenient speed, report to this court said proofs, together with all other matters hereby referred to him, and his opinion thereon.

E F,

Solicitor for Complainant.

After an order *pro confesso* and of reference has been made, the complainant may at once produce such proofs as may be necessary before the commissioner, who takes the same and reports them to the court with his opinion thereon.

A joint defendant in equity who has allowed the bill to be taken as confessed as to himself, is not thereby precluded from bringing an action at law involving the same subject-matter, if the bill itself made out no cause for relief. And ordinarily a suit in equity is no bar or impediment to an action at law.²

¹ See Chan. Rule 28.

77; *Joslin v. Millspough*, 27 Mich.

² *Wheeler v. Hatheway*, 58 Mich. 517; *McGunn v. Hanlin*, 29 Mich.

The following general form, of a report of a commissioner in a *pro confesso* divorce case, gives the general facts necessary to be set out, and can be changed to suit the particular case.

No. 19. Commissioner's report, pro confesso divorce.

(*Title of court and cause.*) To the Circuit Court for the County of Kalamazoo. In Chancery.

In pursuance of and by virtue of an order made in the above-entitled cause, and dated the ——— day of ——— A. D. 18—, by which it was referred to the subscriber, one of the circuit court commissioners, in and for said county, to take proofs of the material facts and circumstances stated in the bill of complaint in the cause, and to report such proofs to this court, with his opinion thereon, I, the subscriber, one of the circuit court commissioners of said county of ———, do hereby certify and report that I have taken proof in this cause on the part of the complainant, and that such proofs are hereto attached and form a part of this, my report. And I do further certify and report, as required by the said order, that in my opinion, all the material facts and circumstances charged in the complainant's bill in this cause are true, and that the marriage and residence of the parties, and that the extreme cruelty of the defendant to the complainant, and that the defendant being of sufficient ability to provide a suitable maintenance for the said complainant, has grossly, wantonly and cruelly neglected and refused so to do, as alleged in said bill of complaint, have been sufficiently proved before me; and that such cruelty and neglect to provide, for which divorce is sought in this cause, were committed without the consent, connivance, privity or procurement, of said complainant, and that such bill is not founded on, or exhibited in consequence of any collusion, agreement or understanding whatever, between the said complainant, A B, and the said defendant, C D, or between the complainant and any other person.

Dated, etc.

E F,
Circuit Court Commissioner,
——— County, Mich.

Effect of a default—When service is by publication.—The statute (§ 6675) provides that upon a default after an order of publication, the bill can not be considered as evidence before the commissioner, and full proof is required of the facts alleged in the bill.¹

No personal decree can be based upon an order of publication, and if one be taken it is absolutely void.²

476; *Kinney v. Robinson*, 52 Mich. 389.

¹ *Brown v. Thompson*, 29 Mich. 415; *State Tax Law Cases*, 54 Mich. 415.

² *State Tax Law Cases*, 54 Mich.

415; *Outhwite v. Porter*, 13 Mich. 540; *Tyler v. Pratt*, 30 Mich. 65; *Innes v. Stewart*, 36 Mich. 282; *Lillibridge v. Tregent*, 30 Mich. 105; *Booth v. Ins. Co.*, 43 Mich. 299; *Colton v. Rupert*, 60 Mich. 326.

Nothing is bound but the property involved in the litigation.¹

Where service is personal.—A default based upon personal service, admits every material fact which is clearly and properly alleged in the bill.²

And a decree *pro confesso* is confined to the precise limits of the case stated and made by the bill.³

No decree can be taken by a complainant where there is a default at the hearing, except such as would be authorized by the pleadings had there been no default.⁴

If the complainant, after a default, amends his bill, or files a supplemental bill, it will have the effect to vacate the order of default, and the defendant may put in an answer.⁵ And an order *pro confesso* is practically waived in so far as it might estop the defendant from maintaining a cross-bill, if the cross-bill is really filed, and both cases are argued together and treated as a single litigation.⁶ When a bill has been taken *pro confesso* against a defendant, unless he has entered his appearance, the complainant need not serve notices upon him of subsequent proceedings, but may proceed *ex parte*.

A bill can not be taken as confessed as against minors, and the evidence, to be preserved in the record, must warrant a decree against them.⁷

The answer of one defendant will sometimes enure to the benefit of another defendant who has been defaulted.⁸

SECTION III.

RIGHT OF DEFENDANT AFTER DEFAULT.

A defendant, being in court, has a right, in a case where the bill is taken as confessed, to appear before the master or com-

¹ *Ibid.*

² *Schwarz v. Sears*, Walk. Ch. 10; *Ward v. Jewett*, *Ibid.* 45.

³ *Griswold v. Fuller*, 33 Mich. 271; *McCabe v. Farnsworth*, 27 Mich. 53; *Harris v. Dietrich*, 29 Mich. 366; *McMahon v. Rooney*, 93 Mich. 390.

⁴ *Hardwick v. Bassett*, 25 Mich. 149; *McMahon v. Rooney*, 93 Mich. 390.

⁵ *Gibson v. Reese*, 50 Ill. 383; see *Black v. Lusk*, 69 Ill. 70.

⁶ *Johnson v. Van Velsor*, 43 Mich. 208.

⁷ *Smith v. Smith*, 13 Mich. 262; *Thayer v. Lane*, Walk. Ch. 200; *Chandler v. McKinney*, 6 Mich. 219.

⁸ *Stockton v. Williams*, Walk. Ch. 120; *Bushby v. Lecour*, 9 Mich. 234; *McCabe v. Farnsworth*, 27 Mich. 53.

missioner, in case of a reference, if he thinks proper. Or, upon the report of the master being made, the defendant may, if he choose, file exceptions and resist its approval; and a defendant who has appeared in a cause, is entitled to notice of all subsequent proceedings.¹

SECTION IV.

SETTING ASIDE A DEFAULT.

A motion to set aside a default, for not filing an answer in chancery, should be based upon an affidavit, setting forth clearly and specifically the reasons for setting it aside, and be accompanied by an answer, and an offer to file the same.²

An application to set aside a default is addressed to the discretion of the court, and an appellate court rarely reviews the exercise of the discretion, and then only to prevent great injustice.³

The party making application to have a default set aside, must support it by an affidavit, showing that the default was taken without any fault or negligence on his part, and that there is merit in his defense, stating what such defense is, so that the court may see whether it is sufficient.⁴

Chancery Rule 7 provides that any order entered under the rules may be set aside on special motion, for cause shown, in the discretion of the court, on such terms as may be deemed just and proper. But to entitle a defendant to an order setting aside his default for want of appearance or answer, he shall

¹ *Jenny v. O'Flynn*, 5 Mich. 217; *Mason v. Reynolds*, 33 Mich. 60; *Moore v. Titman*, 33 Ill. 358.

² *Stockton v. Williams*, Har. Ch. 241; *Graham v. Elmore*, Har. Ch. 265; *Smith v. Saginaw City Bank*, Har. Ch. 426; *Hart v. Lindsay*, Walk. Ch. 72; *Mills v. McLeod*, 86 Mich. 290; *Stradley v. Chippewa Judge*, 96 Mich. 287.

³ Chan. Rule 7; *Bowman v. Wood*, 41 Ill. 203; *Wooster v. Woodhull*, 1 Johns. Ch. 539; *Parker v. Grant*, 1 Johns. Ch. 630; *Gwin v. Harris*, 1 S.

& M. Ch. 528; *Graham v. Elmore*, Harring. Ch. 265; *Russell v. Waite*, Id. 31; *Hart v. Lindsay*, Id. 72; *Terry v. Eureka College*, 70 Ill. 236; *Brewer v. Dodge*, 28 Mich. 359; *Low v. Mills*, 61 Mich. 44; *Benedict v. Auditor*, 104 Mich. 269.

⁴ *Bank of Michigan v. Williams*, Har. Ch. 219; *Thayer v. Swift*, Wal. Ch. 384; *Rich v. Hathaway*, 18 Ill. 548; *Hunt v. Wallis*, 6 Paige Ch. R. 371; see *Stockton v. Williams*, Harring. Ch. 241; *Hart v. Lindsay*, Walk. Ch. 72.

proffer a sworn answer showing a defense on the merits as to the whole or a part of the complainant's case. And in cases where personal service shall have been made upon a defendant, and proceedings taken after default on the strength thereof, his default shall not be set aside unless the application shall be made within six months after such service. And in any case where personal service shall have been made upon a defendant, an order setting aside his default shall be conditioned upon his payment to the complainant of the taxable costs incurred in reliance on said default, and the court may impose such other conditions as shall be deemed proper.

A decree by default will be opened, on a diligent showing of an adequate excuse, by petition, where the case has not been enrolled, even though third parties have purchased, relying on the decree.¹

No. 20. Affidavit in support of motion to set aside a default.

(*Title of the court and cause.*) C D, the above named defendant, makes oath and says, that, etc. (*Here state facts showing the absence of negligence in not putting in an answer in apt time.*) Affiant further states, etc. (*Here state such facts as show a meritorious defense to the bill.*) Affiant therefore prays that the default heretofore entered in this cause, against him, may be set aside; and that he may be permitted to file his answer herewith exhibited, and which he now offers to file in this cause. C D.

Subscribed and sworn, etc.

No. 21. Order setting aside a default and decree pro confesso.

(*Insert caption and title of cause as in No. 18 ante.*)

This cause having come on to be heard upon the motion of C D, defendant, to set aside the default and decree *pro confesso* herein, together with the affidavit filed in support of said motion, and the proposed answer to be filed herein, and it appearing to the court, that (*Here insert the facts, showing the absence of negligence in not putting in an answer in apt time;*) and it further appearing to the court that (*Here insert such facts as show a meritorious defense to the bill;*) and the court having heard the allegations and arguments of counsel for the parties respectively, and being fully advised in the premises, doth order, adjudge and decree that the defendant C D be allowed to be heard touching the matters of such decree upon (*state the terms, as payment of costs, etc.*) and that the said defendant be allowed to file his answer to said bill of complaint, and that the matters to be determined in said decree stand continued and undetermined until the further hearing of this cause hereof; until which time the rights of the respective parties shall stand reversed.

¹*Benedict v. Auditor*, 104 Mich. *French*, 96 Mich. 525; see *Carlisle* 269, and cases cited; *Cook v. v. Carlisle*, 96 Mich. 128.

SECTION V.

SETTING ASIDE DECREE WHEN DEFENDANT IS NOT PERSONALLY NOTIFIED.

Whenever a decree shall be rendered against an absent, non-resident or concealed defendant, who has not been personally notified, the statute provides that "if the defendant against whom such decree shall have been made, unless such decree shall be a decree of divorce, or his representatives shall afterward appear and petition to be heard, the party so petitioning shall be admitted to answer the complainant's bill, upon paying, or securing to be paid, such costs as the court shall adjudge, and the suit shall then proceed in like manner as if the defendant had appeared in due season, and no decree had been made.¹ The right of defendant to appear as above set forth is absolute.² The only effect of a non-resident defendant appearing and answering after decree, under the statute, is to vacate the decree as to him, leaving it to stand as against other defendants.³

The defendant or his representatives, must appear within one year after notice in writing of the decree shall have been given to him or them, and within seven years after making the decree, when such notice shall not have been given.⁴

"If the defendant, or his representatives, shall not so appear within one year after such notice shall have been given, and if not given, before the expiration of seven years after making the decree, the court shall then, by order, confirm the decree against the defendant, and against all persons claiming under him by virtue of any act subsequent to the commencement of the suit, and make such further order in the premises as shall be just and reasonable."⁵

"If the bill shall have been filed to procure the foreclosure and satisfaction of a mortgage, the court, instead of proceeding to a sequestration in the manner hereinbefore directed, may

¹ How Stat. § 6681.

² *McDonald v. McDonald*, 45 Mich. 44.

³ *Gregg v. D. & M. R. R. Co.*, 10 Mich. 117; 8 Paige, 41.

⁴ How. Stat. § 6682; *King v. Harrington*, 14 Mich. 532; *McDonald v. McDonald*, 45 Mich. 45; *Colton v. Rupert*, 60 Mich. 326.

⁵ How. Stat. § 6683.

decree a sale of the mortgaged premises, or of such part thereof as may be necessary to discharge the mortgage and the costs of suit, as in other cases.”¹

“In the case mentioned in the last preceding section, if the defendant at any time before the sale of the mortgaged premises, shall appear and pay to the complainant such costs as the court shall award, the court shall stay the sale, and the same proceedings shall be thereafter had as if the defendant had been served with process and had regularly appeared.”²

“No sale and conveyance regularly made under the preceding provisions, upon a bill for the foreclosure and satisfaction of a mortgage, shall be affected or prejudiced by the appearance of the defendant within one year, or the seven years hereinbefore specified, nor by any other proceedings; but such defendant or his representatives may at any time within seven years after the decree ordering such sale, file a bill against the complainant or his representatives, to account for all moneys received by him or them by virtue of such decree over and above the amount justly due on the mortgage, and costs of suit; and the court shall proceed on such bill according to the equity of the case.”³

In Illinois it has been held that when a petition is filed under a statute of Illinois, very similar to the statute from which we have quoted, the correct practice is to let the former decree stand until the final hearing, and then make such decree, either setting aside the former one, and dismissing the bill, or confirming or modifying the decree, as the equities of the case may require.⁴ Such decrees are interlocutory only.⁵ It would be a technical error to vacate the decree, upon the filing of the petition, and before the final hearing;⁶ yet if by so doing no injury is occasioned to any one, the proceedings will not be reversed and set aside for

¹ How. Stat. § 6684.

² How. Stat. § 6685; *Hardwick v. Bassett*, 25 Mich. 151.

³ How. Stat. § 6686.

⁴ *Southern Bank v. Humphreys*, 47 Ill. 227; *Lawrence v. Lawrence*, 73 Ill. 577.

⁵ *Id.*; *Lyon v. Robbins*, 46 Ill. 276;

Sale v. Fiske, 54 Ill. 292; *Tompkins v. Wiltberger*, 56 Ill. 385; *Hodgen v. Guttery*, 58 Ill. 431.

⁶ *Buck v. Beekley*, 45 Ill. 100; *Mulford v. Stalzenback*, 46 Ill. 303; *Southern Bank v. Humphreys*, 47 Ill. 227.

that reason;¹ nor can such irregularities be attacked collaterally.²

No. 22. *Petition to set aside decree by a defendant not personally notified.*

STATE OF MICHIGAN.

The Circuit Court for the County of ———. In Chancery.

A B,
Complainant,
v.
C D,
Defendant.

To the Circuit Court for the County of ———. In Chancery.

1. The petitioner, C D, of, etc., the above named defendant, respectfully represents unto this honorable court, that on, etc., the above named complainant, A B, exhibited his bill of complaint against the petitioner as defendant, in this court, in this suit, and on making affidavit of the non-residence of the petitioner, procured publication to be made to notify him of the commencement and pendency thereof.

2. That on, etc., being at the ——— term of this honorable court, a *pro confesso* decree in said entitled suit, was rendered against the petitioner, as by the record and proceedings in this cause will more fully and at large appear.

3. And the petitioner further represents unto this court, that he has not been served with the *subpœna* in said cause, or been served with the order of publication, and has received no notice in writing of such decree.

The petitioner, therefore, appears in this honorable court, and asks to be heard touching the matters of such decree, upon such reasonable terms as to the court may seem just, in pursuance of the statute in such case made and provided. And the petitioner presents herewith his answer to the said bill of complaint, and asks that he may be permitted to file the same in said cause, and that upon the hearing, the court will order that said decree be set aside, altered or amended as to the court may seem just; and that the court will grant the petitioner such other relief in the premises as to equity shall appertain.

C D.

E F,

Solicitor for Petitioner.

STATE OF MICHIGAN, }
County of ———, } ss.

On this ——— day of ——— A. D. 18—, personally appeared before me, a notary public in and for said county, the above named petitioner, who made oath that he has heard read the foregoing petition by him subscribed, and that the same is true of his own knowledge, except as to the matters therein stated to be upon information and belief, and as to those matters he believes it to be true.

A B,

Notary Public,

——— Co., Mich.

¹ *Mulford v. Stalzenback*, 46 Ill. 303.

² *Southern Bank v. Humphreys*, 47 Ill. 227.

A *pro confesso* decree made for want of the defendant's appearance may be vacated by the court after enrollment, upon petition or motion; but the rule is otherwise where an appearance has been entered. In such case a re-examination of the case can be had only on a bill of review.¹

A *pro confesso* decree will not be set aside for a confessed technical irregularity in the prior proceedings, unless the application is made at the earliest opportunity. A defendant can not claim a reopening of such a case as a matter of right, when he files his petition long after the time for an appeal has expired, without exhibiting his proposed answer or offering any excuse for such delay.²

¹ *Low v. Mills*, 61 Mich. 36, 41; *Benedict v. Thompson*, Walker's
Maynard v. Pereault, 30 Mich. 160; Ch. R. 447; *Johnson v. Johnson*, *Ib.*
Russell v. White, Walk. Ch. R. 31; 312; *Gould v. Castle*, 47 Mich. 604;
Cook v. French, 96 Mich. 525. *Creveling v. Moore*, 39 Mich. 563.

² *Long v. Long*, 59 Mich. 296;

CHAPTER VIII.

THE DEFENSE TO A SUIT.

Section 1. THE DIFFERENT SORTS OF DEFENSES.

2. DEMURRERS TO A BILL.
3. PLEAS TO A BILL.
4. ANSWERS TO A BILL.
5. DISCLAIMER.
6. ANSWER IN NATURE OF CROSS-BILL.

SECTION I.

THE DIFFERENT SORTS OF DEFENSES.

The defense to a suit in equity may be either by *demurrer*, by *plea*, by *answer*, or by *disclaimer*.

1. By *demurrer*, by which he appeals to the judgment of the court, whether he shall be compelled to answer the bill or not. This species of defense is resorted to where it appears upon the face of the bill itself that there is no equity in the case on the part of the complainant.

2. By *plea*, by which he shows why the suit should be dismissed, delayed or barred. A plea sets up matter of defense not appearing in the bill.

3. By *answer*, controverting the case stated by the complainant, the defendant may confess and avoid, or traverse and deny, the several parts of the bill; or, admitting the case made by the bill, may submit to the judgment of the court upon it, or upon a new case made by the answer, or both

4. By a *disclaimer*, the defendant may at once terminate the suit by disclaiming all right or interest in the matter sought by the bill.

5. By *demurrer*, *plea*, *answer* and *disclaimer*, or by two or more of them, provided each relates to a separate and distinct part of the bill.

A cross-bill may also be considered a species of defense.¹

The above is the general order of pleading to be pursued by the defendant. All pleas of a dilatory character, and objections of that nature, must be interposed at the earliest opportunity.²

SECTION II.

DEMURRER TO A BILL.

Its nature and uses.—Whenever any ground of defense is apparent upon the face of the bill, either from matters therein stated, or from defects in its frame, or in the case made by it, the proper mode of defense is by demurrer.³ The word demurrer comes, as Lord Coke has said, from the Latin word *demorari*, to abide; and, therefore, he that demurs in law, is said to abide in law. He will go no further until the court has decided whether the other party has shown sufficient matter in point of law to maintain his suit.⁴

A demurrer is in bar of the relief sought, and it proceeds upon the ground that, admitting the fact stated in the bill to be true, the complainant is not entitled to the relief he seeks. It is always founded upon some strong point of law, going to the absolute denial of the relief sought; but defects in substance are not supplied or aided by it, nor defective statements of title or claims to relief cured by it. The demurrer only admits that which is well stated or pleaded, and for the purpose of that issue only.⁵ It does not admit any matters of law which

¹ *Galatin v. Erwin*, Hopk. Ch. R. 48, 58; 1 Barb. Ch. Pr. 105.

² *Conley v. Good*, Breese, 135; *Duncan v. Charles*, 4 Scam. 561; *Wilson v. Nettleton*, 12 Ill. 61; *Peeples v. Peeples*, 19 Ill. 270; *Gilmore v. Nowland*, 26 Ill. 200; *Archibald v. Argall*, 53 Ill. 307; *James v. Morgan*, 36 Conn. 348; *Bowman v. McLaughlin*, 58 Maine, 299; *Green v. Craig*, 47 Mo. 90; *Brown v. Powell*, 45 Ala. 149; *Johnson v. Johnson*, Walk. Ch. 311.

³ *McCloskey v. McCormick*, 44 Ill. 336; *Wangelin v. Goe*, 50 Ill. 459;

Story's Eq. Pl. § 441; 2 Barb. Ch. Pr. 105; *Mitf. Eq. Pl.* 107; *Beard v. Fowler*, 2 Bond, 13; *Gallaher v. Roberts*, 1 Wash. C. C. 320.

⁴ *Co. Litt.* 71, note b; *Coop. Eq. Pl.* 110; *Black. Com.* 314; *Story's Eq. Pl.* § 441; *Verplank v. Caines*, 1 Johns. Ch. R. 57.

⁵ *Cook v. R. Co.*, 45 Mich. 453; *Stowe v. Russell*, 36 Ill. 18; *Mills v. Brown*, 2 Scam. 549; *Moore v. Hoisington*, 31 Ill. 248; *Verplank v. Caines*, 1 Johns. Ch. R. 57; *Washington v. State*, 19 Md. 239; *Newell v. Supervisors*, 36 Ill. 253; *Baker v.*

may be suggested in the bill, or inferred from the facts stated in it; nor any fact that is not specifically charged.¹

A demurrer is an appearance in the cause; and a general demurrer waives objections to the jurisdiction of the person. But defects in the jurisdiction of the subject-matter of the suit can not be waived.² But it does not admit the truth of the matters that are not relevant or well pleaded; nor the correctness of legal inferences; nor unreasonable deductions of facts; nor unreasonable or inequitable meanings or implications.³

A general demurrer to a bill challenges the equity of the case therein presented, and must be overruled if it sets out any case for equitable relief, however imperfectly.⁴ And it will be overruled if the bill can be sustained upon any theory of the case.⁵

A demurrer may be sustained on the ground of the staleness of the claim set up in a bill,⁶ and lapse of time sufficient to create a bar under the statute of limitations unaccounted for by the bill, may be taken advantage of by demurrer.⁷ It is otherwise if the *laches* are accounted for by the bill.⁸

Booker, 6 Price, 381; *Choteau v. Rice*, 1 Minn. 106; Harr. Ch. R. 308; *Barton's Suit in Eq.* 96; 1 Dan. Ch. Pr. 601; *Dunham v. Hyde Park*, 75 Ill. 371; *Roby v. Cossitt*, 78 Ill. 638.

¹ *Stowe v. Russell*, 36 Ill. 18; *Green v. Dodge*, 6 Ham. 80; *Smith v. Henry*, 15 Iowa, 385; *Coop. Eq. Pl.* 111; *Williams v. Steward*, 3 Meriv. 472; 492; *Earle v. Holt*, 5 Hare, 180; *Baker v. Booker*, 6 Price, 381; *Walton v. Westwood*, 73 Ill. 125; *Judson v. Stephens*, 75 Ill. 225; *Lebaron v. Shepherd*, 21 Mich. 263.

² *Thompson v. Benefit Ass'n*, 52 Mich. 522; *Attorney General v. Moliter*, 26 Mich. 444; *Stone v. Wel-ling*, 14 Mich. 514; *Woodruff v. Young*, 43 Mich. 548.

³ *Churchill v. Cummings*, 51 Mich. 446, 449; *Johnson v. Roberts*, 102 Ill. 655; *Gage v. Bailey*, 115 Ill. 646; *Greig v. Russell*, *ib.* 483.

⁴ *Wilmarth v. Woodcock*, 58 Mich. 482; *Glidden v. Norvell*, 44 Mich. 206; *Hoffman v. Ross*,

25 Mich. 175; *Clark v. Davis*, Har. Ch. R. 227; *Cochrane v. Adams*, 50 Mich. 17; *Darrah v. Boyce*, 62 Mich. 480; *Taylor v. Taylor*, 87 Mich. 64; *Caldwell v. Ward*, 83 Mich. 13.

⁵ *Darrah v. Boyce*, 62 Mich. 480, 485; *Cochrane v. Adams*, 50 Mich. 17; see *Merrifield v. Ingersoll*, 61 Mich. 4; *Day v. Cole*, 56 Mich. 295; *Shaw v. Chase*, 77 Mich. 436.

⁶ *Copen v. Flesher*, 1 Bond. 440; *Baent v. Kennicutt*, 57 Mich. 268; *Hurlbut v. Britain*, 2 Doug. 191; *McLean v. Barton*, Har. Ch. R. 279; *Campau v. Chene*, 1 Mich. 400; *Reynolds v. Green*, 10 Mich. 355; *Frost v. Missionary Society*, 56 Mich. 62; *Harris v. McIntire*, 118 Ill. 276; *Highston v. Franks*, 93 Mich. 52.

⁷ *Rhode Island v. Massachusetts*, 15 Pet. 223; *Maxwell v. Kennedy*, 8 How. (U. S.) 210; *Wisner v. Barnet*, 4 Wash. C. C. 631.

⁸ *Id.*

A demurrer may be to the whole bill, or to a part only of the bill; and the defendant may, therefore, demur as to part, plead as to another part, and answer as to the residue of the bill. But each of these modes of defense must be actually applied to different and distinct parts of the bill, and so applied that each will be consistent with the other; so that one will not overrule the other.¹ Thus, for example, if there is a demurrer to the whole bill, an answer to a part thereof is inconsistent, and the demurrer will be overruled.² For the same reason, if there is a demurrer to a part of a bill, there can not be a plea or answer to the same part without overruling the demurrer.³ After answer, it is too late to demur, unless the answer is first withdrawn by leave of court.⁴

It is a rule that a plea, or answer, and demurrer to the same matter, can not stand together, and the plea or answer overrules the demurrer.⁵ Chancery Rule 8, provides that "no plea shall be held bad, and overruled upon argument, only because the answer of defendant may extend to the same matter as may be covered by such plea." This rule, it will be seen, has abolished the doctrine just stated. The same rule exists in the English chancery orders of 1841, and in the United States court.⁶

If a demurrer is too general, that is, if it covers, or is applied to the whole bill, when it is good to a part only; or if it is a demurrer to a part only, but is not good to the full extent which it covers, but is so only to a part, it will be overruled;⁷ for it is a general rule, that a demurrer can not be

¹ Coop. Eq. Pl. 112. 113; *Tidd v. Clare*, 2 Dick. 712; *Potarlinton v. Soulby*, 6 Sim. 356; Lord Red. 214; *Livingston v. Story*, 9 Pet. 632; *Spofford v. Manning*, 6 Paige Ch. R. 383; *Pierpont v. Fowle*, 2 Woodbury & Minot's R. 23.

² *Williams v. Hubbard*, Walk. Ch. 28; *Brill v. Stiles*, 35 Ill. 305; *Davies v. Davies*, 2 Keen R. 538; *Clark v. Phelps*, 6 Johns. Ch. R. 214; *Heath v. R. R. Co.*, 8 Blatchf. 347; *Miller v. Furse*, 1 Bailey's Ch. R. 187.

³ *Story's Eq. Pl.* § 442; *Jones v. Strafford*, 3 P. Wms. R. 80; *Donner*

v. Fortescue, 2 Atk. R. 282; *Kuyper v. Ref. Dutch Ch.*, 6 Paige Ch. R. 570.

⁴ *Brill v. Stiles*, 35 Ill. 305.

⁵ *Clarke v. Phelps*, 6 Johns. Ch. R. 214; *Chase's Case*, 1 Bland, 206; *Robertson v. Bingley*, 1 M'C. Ch. 333; *Saxon v. Barksdale*, 4 Dessau. 522; *Baines v. McGee*, 1 S. & M. 208; *Bank v. Carpenter*, Wright, 729.

⁶ *Story's Eq. Pl.* § 443, n. 2; see *Dell v. Hale*, 2 Younge & Coll. New. R. 1; U. S. Eq. Rule 37.

⁷ *Durling v. Hammer*, 20 N. J. Eq. R. 220; *Brownlee v. Lockwood*,

good as to a part which it covers, and bad as to the rest; and, therefore, it must stand or fall together.¹ If the court sustains a demurrer in part, and overrules it as to the residue, the complainant, by amending his bill, and the defendant, by answering the amended bill, waive the irregularity.²

It was formerly the rule, that if a demurrer does not cover so much of the bill as it might by law have extended to, it would be held bad;³ but this doctrine is, however, now changed by the orders of the English Court of Chancery,⁴ the rule of the Supreme Court of the United States,⁵ and Michigan Chancery Rule 8, which provide, that "no plea shall be held bad and overruled upon argument only, because such plea shall not cover so much of the bill as it might by law have extended to."

A demurrer may be put in, and several causes assigned; and if one cause is good to the whole extent of the demurrer, and another is bad, the demurrer will be sustained; for if both were bad, the defendant may, *ore tenus*, assign new causes of demurrer at the argument to matters of substance, although not to matters of form; so that any one good cause existing of record, or otherwise assigned, will do.⁶

When there are several defendants, if they all join in one demurrer to a bill, the demurrer may be good, and be sustained, as to one of the defendants, and be bad, and overruled as to the others; for the defense may be good to one person, and wholly inapplicable to another.⁷

20 N. J. Eq. R. 239; 3 Green's N. J. R. 270; *Banta v. Moore*, 2 McCarter's N. J. R. 97; *Hawkins v. Clement*, 15 Mich. 511; *Treadwell v. Brown*, 44 N. H. Rep. 551; *Brown v. Hogle*, 30 Ill. 119; *Blount v. Garen*, 3 Hey. 88; *Fancher v. Ingraham*, 6 Blackf. 139; *Heath v. R. R. Co.*, 8 Blatchf. C. C. 347; *Hoffman v. Ross*, 25 Mich. 175; *Williams v. Hubbard*, Walk. Ch. 28.

¹ Story's Eq. Pl. § 443; *Metcalf v. Hervey*, 1 Ves. 248; *Higginbotham v. Burnet*, 5 Johns. Ch. 136; *Todd v. Gee*, 17 Ves. 273; *Knight v. Moseley*, Amb. 176; *Wynne v. Jackson*, 1 McClell. & Youngs, 35.

² *Peck v. Burgess*, Walk. Ch. 485; *Marshall v. Vicksburg*, 15 Wall. 146.

³ Story's Eq. Pl., § 443; *Dawson v. Sadler*, 1 Sim. & Stu. R. 537, 542.

⁴ 1 Craig & Phill. R. 379.

⁵ Rule 36 of Rules of Pr. C. E. of U. S. 1870.

⁶ Story's Eq. Pl. § 443; *Barton's Suit in Eq.*, 96; *Coop. Eq. Pl.*, 112, 113; *Lord Red.*, 217; *Jones v. Frost*, Jac. 468; *Clark v. Davis*, Har. Ch. 227.

⁷ Story's Eq. Pl. § 445; *Coop. Eq. Pl.*, 113; *Mayor of London v. Levy*, 8 Ves. R. 403, 404; *Barstow v. Smith*, Walk. Ch. R. 394.

When a bill in equity sets forth various claims to the interposition of the court, and the defendant files a general demurrer to the whole bill, it must be overlooked if any of the claims afford a proper case for the jurisdiction of the court.¹ The proper course is to demur to such claims as are entitled to no relief, and answer the balance.²

Where a demurrer will lie.—If a bill shows upon its face that there is a want of sufficient parties,³ or a misjoinder of parties,⁴ a demurrer will lie; but it must point out who are the proper parties,⁵ but those only can demur who are improperly joined.⁶

If the want of jurisdiction,⁷ or the bar of the statute of limitations, or defenses of a kindred character,⁸ or the statute of frauds⁹ appear upon the face of the bill, it will be obnoxious to a demurrer, unless circumstances are alleged taking the case out of those statutes.¹⁰

¹ *Brown v. Hogle*, 30 Ill. 119; *Livingston v. Story*, 9 Pet. 632; *Brockway v. Copp*, 3 Paige Ch. 539; *Fancher v. Ingraham*, 6 Blackf. 139; *Carter v. Longworth*, 4 Ham. 384; *Higginbotham v. Burnet*, 5 Johns. Ch. R. 184; *Holleclan v. Johnson*, 2 Decis. 146; *Griggs v. Thompson*, 1 Geo. Decis. 146.

² *Varick v. Smith*, 5 Paige Ch. R. 137.

³ *Spear v. Campbell*, 4 Scam. 424; *Prentice v. Kimball*, 19 Ill. 320; *Lowry v. Harris*, 12 Minn. 255; *Walford v. Phelps*, 2 J. J. Marsh. 31; *Mitchell v. Lenox*, 2 Paige Ch. R. 281; *Robinson v. Smith*, 3 Paige, Ch. R. 222; *Story's Eq. Pl.*, § 541; see *Hand v. Dexter*, 41 Geo. 454.

⁴ *Berger v. Potter*, 32 Ill. 66; *Christian v. Crocker*, 25 Ark. 327; *Melick v. Melick*, 2 Green N. J. R. 156; *White v. Delschneider*, 1 Oregon R. 254.

⁵ *Robinson v. Smith*, 3 Paige Ch. R. 222; *Dais v. Bouchaud*, 10 Paige, Ch. R. 445; *Story's Eq. Pl.*, § 543; *Lord Red.*, 108; *Moore v. Armstrong*, 9 Porter, 607; *Smith v. Kornegay*, 1

Jones' N. C. Eq. R. 40; *Woodruff v. Young*, 43 Mich. 548; *Bengley v. Wheeler*, 45 Mich. 493.

⁶ *Sweet v. Cameron*, 88 Mich. 1; *Torrent v. Hamilton*, 95 Mich. 159.

⁷ *Smith v. Morehead*, 6 Jones' N. C. Eq. 360; *C. & N. W. R. R. Co. v. Nichols*, 57 Ill. 464; *Varick v. Dodge*, 9 Paige Ch. R. 149.

⁸ *Evcland v. Stephenson*, 45 Mich. 394; *Henry Co. v. Drain Co.*, 52 Ill. 299; *Id.*, 53 Ill. 454; *Hovenden v. Annesley*, 2 Sch. & Lef. 637; *Hardy v. Reeves*, 4 Ves. R. 479; *Foster v. Hodgson*, 19 Ves. R. 180; *Surtser v. Skiles*, 3 Gilm. 529; *Denny v. Gilman*, 26 Maine, 149; *School Trustees v. Wright*, 12 Ill. 432; *Coster v. Murray*, 5 Johns. Ch. R. 522; *Hook v. Whitlock*, 7 Paige Ch. R. 373; *Maxwell v. Kennedy*, 8 How. (U. S.) 222; *Wisner v. Burnet*, 4 Wash. R. R. 631.

⁹ *School Trustees v. Wright*, 12 Ill. 432; *Surtser v. Skiles*, 3 Gilm. 529; but see *Lear v. Chouteau*, 23 Ill. 39; *Hull v. Peer*, 27 Ill. 312.

¹⁰ *Henry Co. v. Drain Com.*, 52 Ill. 454; *Story's Eq. Pl.*, § 503, 760, 751

A demurrer will also lie where the bill is multifarious;¹ or shows upon its face that the complainant has an adequate remedy at law;² except in cases of fraud³ and trusts;⁴ in which courts of equity retain jurisdiction, notwithstanding courts of law may also have jurisdiction.

A demurrer will also be sustained where the bill shows a want of title or interest in the complainant to the thing demanded;⁵ and where a party, having no interest in the controversy, is improperly joined as a party complainant;⁶ and where the bill shows no equity on its face,⁷ or is brought for a part of a matter only,⁸ or fails to show some claim or interest in the defendant.⁹

The question whether a bill shows equity on its face should be raised by demurrer, and not by motion.¹⁰ But in some

¹ *Taylor v. King*, 32 Mich. 42; *Woodruff v. Young*, 43 Mich. 548; *Henderson v. Cummings*, 44 Ill. 325; *Burnett v. Lester*, 53 Ill. 325; *Wilson v. Wilson*, 28 Md. 162; *Waller v. Taylor*, 42 Ala. 297; *Supervisors v. State's Attorney*, 31 Ill. 68; *Darling v. Hammer*, 20 N. J. Eq. R. 220; *Oliver v. Piatt*, 3 How. (U. S.) 333; *Many v. Beekman Iron Co.*, 9 Paige Ch. R. 188; *Luckett v. White*, 10 Gill & J. R. 490; *Thurman v. Shelton*, 10 Yerg. 383; *Buffalow v. Buffalow*, 2 Ired. Ch. R. 113; *Darcey v. Lake*, 46 Miss. 109; *Atwill v. Ferrett*, 2 Blatchf. C. C. 39; *Crain v. Kennedy*, 85 Ill. 340; *Gilmore v. Sapp*, 100 Ill. 297; *Baird v. Jackson*, 98 Ill. 78; *Rann v. Rann*, 95 Ill. 433.

² *Wangelin v. Goe*, 50 Ill. 459; *Wylder v. Crane*, 53 Ill. 490; *People v. City*, 48 Ill. 485; *Lynch v. Willard*, 6 Johns. Ch. R. 342; *Bottof v. Conner*, 1 Blackf. 287; *Foster v. Swasey*, 2 W. & M. C. C. 217; *Turbell v. Bowman*, 103 Mass. 341; *Scruggs v. Blair*, 44 Miss. 406; *Jevne v. Osgood*, 57 Ill. 340; *Brown v. Ry. Co.*, 96 Ill. 297; *Douglass v. Martin*, 103 Ill. 25.

³ *Hubbard v. McNaughton*, 43 Mich. 220; *Babcock v. McCament*,

53 Ill. 215; *Ogden v. Larrabee*, 57 Ill. 339; *Truett v. Wainwright*, 4 Gilm. 418; *Kennedy v. Northup*, 15 Ill. 148.

⁴ *Coats v. Woodworth*, 13 Ill. 654; *Norton v. Hixon*, 25 Ill. 440.

⁵ *Ramere v. Rawlins*, Finch, 36; *Newman v. Holder*, Id.; *Stooke v. Vincent*, 1 Collyer, 527; *Story's Eq. Pl.* § 503.

⁶ *Barstow v. Smith*, Walk. Ch. 349; *Plummer v. May*, 1 Vern. 426; *Dineley v. Dineley*, 2 Atk. 394; *How v. Best*, 5 Mad. 19; *Welf Eq. Pl.* 282.

⁷ *Thayer v. Lane*, Har. Ch. 247; *Hawkins v. Clermont*, 15 Mich. 511; *Williams v. Hubbard*, Walk. Ch. 28; *Edwards v. Hurlburt*, Walk. Ch. 54; *Burpee v. Smith*, Walk. Ch. 327; *Hoffman v. Ross*, 25 Mich. 175; *President, etc., v. S. Ill. N. Uni.*, 54 Ill. 334; *Calhoun v. Powell*, 42 Ala. 645; *Winkler v. Winkler*, 40 Ill. 179; *Harris v. Galbraith*, 43 Ill. 309; *Moore v. Armstrong*, 9 Porter, 697.

⁸ *Hinde*, Ch. Pr. 157; *Lord Red.* 16; *Story's Eq. Pl.* § 287.

⁹ *Wych v. Meal*, 3 P. Wms. R. 311; *Stewart v. East Indian Co.*, 2 Vern. 380; *Attorney-general v. Bradford Canal Co.*, 2 Eq. Cas. Abr. 78.

¹⁰ *Town of Tamoroa v. Trustees*,

cases where no objections were interposed as to manner of raising the objection, the bill has been dismissed upon motion.¹ But if the complainant objects to the raising of the question in that manner, the motion will not be entertained, and if filed will be stricken off. If no objections are interposed the motion is treated the same as a demurrer.²

Where a defendant demurs to a bill on the ground it presents no case for the interposition of a court of equity, but declines to answer, even upon being ruled to answer, he will not be held as having waived his objection that there was a want of jurisdiction.³

Demurrers are either *general* or *special*.

General demurrer.—Demurrers are *general* when no particular cause is assigned, except the usual formulary that there is no equity in the bill.⁴ It waives all technical objections⁵ and can not be sustained if the bill makes out any cause whatever for equitable relief.⁶

Special demurrer.—Demurrers are *special*, when the particular defects or objections to a bill are pointed out. A special demurrer is indispensable, where the objection is to the defects of the bill in point of form.⁷ The objections pointed out should not be argumentative, but must be set down with reasonable certainty and directness.⁸

Joint demurrer.—The terms of a demurrer should suggest the errors complained of, and when two defendants join in a

etc., 54 Ill. 334; *Winkler v. Winkler*, 40 Ill. 179; *Harris v. Galbraith*, 43 Ill. 303; *Brill v. Stiles*, 35 Ill. 305; *Calhoun v. Powell*, 42 Ala. 645; *Moore v. Armstrong*, 9 Porter, 697; *Clark v. Davis*, Har. Ch. 227; *Thayer v. Lane*, Har. Ch. 247; *Woodward v. Clark*, 15 Mich. 104; *Hawkins v. Clermont*, 15 Mich. 511; *Hoffman v. Ross*, 25 Mich. 175.

¹ *Thomas, etc., v. Adams*, 30 Ill. 37; *Edwards v. Beaird*, Breese, 70; *Fisher v. Stone*, 3 Scam. 68; *Great-house v. Kipp*, Id. 371; *State Bank v. Stanton*, 2 Gilm. 352; *Puterbaugh v. Elliott*, 22 Ill. 157; *Town v. University*, 54 Ill. 334; *Wangelin v. Goe*, 50 Ill. 459.

² *Gaye v. Griffin*, 103 Ill. 41.

³ *Town of Tamaroa v. Trustees, etc.*, 54 Ill. 334; *Vieley v. Thompson*, 44 Ill. 9.

⁴ *Barton's Suit in Eq.* 107, 108; *Story's Eq. Pl.* § 445; *Taylor v. Taylor*, 87 Mich. 64.

⁵ *Caldwell v. Ward*, 83 Mich. 13.

⁶ *Shaw v. Chase*, 77 Mich. 436.

⁷ *McCloskey v. McCormick*, 44 Ill. 336; *Pogue v. Clark*, 25 Ill. 351; *McElwain v. Willis*, 3 Paige Ch. R. 505; *Forbes v. Whitlock*, 3 Edw. Ch. R. 446; *Nash v. Smith*, 6 Conn. R. 421; *Marsh v. Marsh*, 1 Green N. J. 391.

⁸ *Story's Eq. Pl.* § 455; *Barton's Suit in Eq.* 97; *Mitf. Eq. Pl.* 213, 214.

demurrer for want of equity solely, neither can be allowed to raise a question not available to both.¹

A demurrer for want of parties is bad where the bill fails to show any interest in the parties named in the subject-matter of the suit.²

Michigan rule.—Chancery Rule 9 provides that the form of a demurrer may be as follows:

No. 23. Form of a general demurrer.

STATE OF MICHIGAN,

The Circuit Court for the County of ———, in Chancery.

A B,	Complainant,	}
	v.	
C B,	Defendant.	}

The demurrer of C D, defendant, to the bill of complaint of A B, complainant.

This defendant says that the complainant has not stated such a case in his bill as entitles him to relief in a court of equity, for the following reasons: * (*Here state briefly, but plainly, the special reasons in matters of substance in a general demurrer, as well as matters of form in a special demurrer.*)

Wherefore this defendant demurs to the said bill, and prays the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill, and he prays to be dismissed with his reasonable costs on this behalf sustained.

By ———,
Solicitor for Defendant.

This rule abolishes the distinction between *general* and *special* demurrers to the extent that the causes of demurrer must now be plainly specified in both matters of form and substance.

The rule requires the demurrer to specify plainly the special reasons why the complainant is not entitled to relief.

It is the intention of How. Stat. §§ 7358, 7359, and Circuit Court Rule 9, to require every objection, either of form or matter of substance, to be specified in a demurrer; and if this is not done, and the declaration or bill sets forth a cause of action or ground for relief, the demurrer will be overruled.³

¹ *Smith v. Converse*, 88 Mich. 1.

² *Alger v. Slaght*, 64 Mich. 589;
see *Woodruff v. Young*, 43 Mich.
548; *Bengley v. Wheeler*, 45 Mich.

493; *Emerson v. Township of Walker*,
63 Mich. 483.

³ *Adrian Water Works v. City of
Adrian*, 64 Mich. 584.

Certificate of counsel.—Rule 9 further provides that to every demurrer there shall be added the individual certificate of counsel having principal charge of the cause in behalf of the party filing the demurrer, to the effect that the demurrer is not interposed for delay, and that in his opinion it is well founded; and a demurrer not accompanied with such a certificate shall be stricken from the files on motion, unless the court shall deem it proper to allow the certificate to be added.¹

No. 24. Certificate of counsel that a demurrer to a bill is well founded in law, and not interposed for delay.

(Following the demurrer add.) I certify that (I have the principal charge of this cause in behalf of the ———) that in my opinion the foregoing demurrer of C D, defendant to the bill of A B, complainant, is well founded in law, and proper to be filed in the cause, and that the same is not interposed for delay.

Sol. for Defendant.

Several causes of demurrer.—A defendant is not limited to show one cause of demurrer only. He may assign as many causes as he pleases, either to the whole bill, or to each part of the bill demurred to; and if any one of the causes assigned holds good, the demurrer will be allowed.²

Separate demurrers.—A defendant may also put in separate demurrers to separate and distinct parts of a bill, for separate and distinct causes;³ for the same grounds of demurrer, frequently, will not apply to different parts of a bill, though the whole may be liable to demurrer; and in such a case one demurrer may be overruled, upon argument, another allowed.⁴

Speaking demurrer.—Care must be taken, in framing a demurrer, that it be made to rely only upon the facts stated in the bill; otherwise it will be what is termed a speaking demurrer, and will be overruled.⁵ A speaking demurrer is one which introduces some new fact or averment which is necessary

¹ *Nat. Bk. v. Ins. Co.*, 104 U. S. 54; *Ewing v. Blight*, 3 Wall. Jr., 134; *Comstock v. McEvoy*, 52 Mich. 324.

² 1 Barb. Ch. Pr. 107; *Harrison v. Hogg*, 2 Ves. Jr. 323; *Jones v. Frost*, 3 Mad. 1

³ *Mitt. Eq. Pl.* 174; 1 Barb. Ch. Pr. 107; *North v. Earl of Strafford*,

3 P. Wms. 148; *Roberdean v. Rous*, 1 Atk. 544.

⁴ 1 Barb. Ch. Pr. 107; *North v. Earl of Stafford*, 3 P. Wms. 148.

⁵ *Brownsword v. Edwards*, 2 Ves. 245; *Tallmadge v. Lovett*, 3 Edw. Ch. 563; *Lamb v. Starr*, 1 Deady, 350.

to support the demurrer, and which does not distinctly appear upon the face of the bill.¹

Demurrer ore tenus.—Where a demurrer is put into the whole bill, for causes assigned on the record, if those causes are overruled, the defendant will be allowed to assign other causes of demurrer, *ore tenus*, at the argument.² But in such a case, if the demurrer, *ore tenus*, is allowed, the defendant is not entitled to his costs, even though he may not be obliged to pay costs on the demurrer, on record, which has been overruled.³ But a demurrer *ore tenus*, will never be allowed, unless there is a demurrer on record; for if there is a plea on record, and that is disallowed, a demurrer, *ore tenus*, will also be disallowed.⁴ Whenever a demurrer, *ore tenus*, is permitted, it must be for some cause which covers the whole extent of the demurrer.⁵ And it has been held that the right to put in such a demurrer, *ore tenus*, applies only to cases where the demurrer is to the whole bill, and not to cases where it is to a part only, notwithstanding it is co-extensive with the demurrer to that part.⁶

Joint demurrer.—When several defendants join in a demurrer, only such grounds should be considered as are available to all defendants.⁷

For a misjoinder of parties defendant, those only can demur who are improperly joined.⁸

Demurrer coupled with an answer.—Where a demurrer is

¹ 1 Barb. Ch. Pr. 107; *Brooks v. Gibbons*, 4 Paige Ch. R. 374; *Davies v. Williams*, 1 Sim. 5; *Cawthorn v. Chalie*, 2 Sim. & Stu. 127; *Kuypers v. Dutch Ref. Ch.*, 6 Paige Ch. R. 570; *Story's Eq. Pl.* § 448; *Coop. Eq. Pl.* 111.

² *Clark v. Davies*, Har. Ch. 227; *Story's Eq. Pl.* § 464; *Coop. Eq. Pl.* 112; 1 Barb. Ch. Pr. 108; *Cartwright v. Green*, 8 Ves. 409; *Beame's Ord.* in Ch. 174; *Brickerhoff v. Brown*, 6 Johns. Ch. 149; *Vanhorn v. Duckworth*, 7 Ired. Eq. R. 261; *Caldwell v. Blackwood*, 1 Jones' N. C. Eq. 274.

³ *Ib.*; *Ib.*

⁴ *Coop. Eq. Pl.* 112; *Dundant v.*

Redman, 1 Vern. 78; *Attorney-General v. Brown*, 1 Swanst. 288; *Hook v. Dorman*, 1 Sim. & Stu. 227; *Story's Eq. Pl.* § 443, 464.

⁵ *Baker v. Mellish*, 11 Ves. 70--76; *Stillwell v. McNeeley*, 1 Green Ch. R. 305; *Burk v. Foundry Co.*, 98 Mich. 616.

⁶ *Shepherd v. Lloyd*, 2 Y. & Jerv. 490; 1 Barb. Ch. Pr. 109; *Story's Eq. Pl.* § 464; see *Crouch v. Hicken*, 1 Keen, 385; *Garlick v. Strong*, 3 Paige Ch. R. 452.

⁷ *Sweet v. Converse*, 88 Mich. 1; *Burk v. Foundry Co.*, 98 Mich. 614.

⁸ *Sweet v. Converse*, 88 Mich. 1; *Bigelow v. Sanford*, 98 Mich. 657.

to part of the bill only, the answer to the remainder usually follows the statement of the cause of demurrer and the demand of judgment, whether the defendant ought to be held to make further or other answer. But as the demurrer asks the judgment of the court whether the defendant shall make further or other answer to the bill, or to that part demurred to, it would be inconsistent if the defendant, after making such submission, were to be permitted to answer the bill, or that part of it which is intended to be covered by the demurrer.¹ It is for this reason, well settled, that an answer to any part of a bill demurred to will overrule the demurrer;² even though the part answered be immaterial.³ But a demurrer for multifariousness is not overruled by an answer denying confederacy;⁴ nor is a demurrer to relief only overruled by an answer to the discovery.⁵

The fact that a bill does not ask for the proper relief, or asks for inconsistent relief, is no ground for demurrer.⁶

If the demurrer does not go to the whole bill, it must clearly express the particular parts of the bill which it is designed to cover; for if the particulars are not distinguished, the court will be compelled to look over the whole bill in order to discover them. And this must be done not by way of exception, as by demurring to all except certain parts of the bill; but by a positive definition of the parts to which the defendant seeks to avoid making any answer.⁷

Demurrer to plea or answer.—The practice of demurring to an answer is in violation of all the rules of chancery practice, and will not be tolerated. The same may be said of demurring to a plea. The proper practice is to set down the plea for hearing, when its sufficiency will be considered.⁸

When to be filed.—A demurrer should be filed before the complainant is entitled to a default, and all objections to the bill must be made in the court where the same is filed. It

¹ *Jones v. Earl of Strafford*, 3 P. Wms. R. 81; 1 Barb. Ch. Pr. 108.

² *Tidd v. Clare*, 2 Dick. R. 81; *Hester v. Weston*, 1 Vern. R. 463; *Roberts v. Clayton*, 3 Anst. R. 715.

³ Mitf. Eq. Pl. 172; 1 Barb. Ch. Pr. 108; *Savage v. Smalebroke*, 1 Vern. 90.

⁴ *Hester v. Weston*, 1 Vern. R. 463; 1 Eq. Cas. Abr. 40.

⁵ 2 Dan. 76; 1 Barb. Ch. Pr. 108.

⁶ *Conner v. Board of Supervisors*, 10 Minn. 439.

⁷ Story's Eq. Jur. §§ 457-8; *R. R. Co. v. Macomb*, 2 Fed. Rep. 18.

⁸ See Chan. Rule 8.

has been held in Illinois that it is too late to make objections to the sufficiency of the bill, for the first time, in the Supreme Court.¹

Joinder in demurrer.—Chancery Rule 9 provides, that a joinder in demurrer shall not be necessary, and either party may at once notice a demurrer for argument at the next term of court. Such notice should be served at least ten days before the first day of such term. But if the cause is not in readiness for hearing in time to so notice it, it may be noticed for a subsequent day in term, not less than ten days after such notice, and placed at the foot of the calendar.

Hearing.—In hearing a demurrer, the argument is strictly confined to the case appearing upon the record; and, for the purpose of the argument, the matters of fact stated in the bill are admitted to be true.²

Effect of sustaining or overruling demurrer.—Chancery Rule 9 provides, that if the demurrer be overruled, the court shall on such terms and conditions as are reasonable, permit the defendant to answer; and if the demurrer be sustained, the court shall likewise permit the complainant to amend his bill.

When amendment allowed without costs.—Said rule further provides, that if any pleading shall be adjudged bad for any cause which is not plainly specified in the demurrer, the party pleading shall be allowed to amend without costs.³

On sustaining a demurrer which goes to the merits of the whole bill, the bill may be dismissed, but on the allowance of a special demurrer when the objections can be obviated by simply striking out the objectionable feature, the court should give an opportunity for amendment.⁴

No. 25. Demurrer for multifariousness.

(Commence as in No. 23, ante, at the *, and state cause of demurrer as follows:) That it appears by the said bill that the same is exhibited against this defendant, and the several other persons therein named as defendants

¹ *Hickey v. Forristal*, 49 Ill. 255; *Nelson v. Bank*, 48 Ill. 36.

Ham. 80; *Le Baron v. Shepherd*, 21 Mich. 263.

² *East India Co. v. Hinchman*, 1 Ves. Jr. 289; 1 Barb. Ch. Pr. 111; *Wales v. Bank of Michigan*, Harring. Ch. R. 308; *Green v. Dodge*, 6

³ How. Stat., § 7359.

⁴ *Bigelow v. Sanford*, 98 Mich. 652.

thereto for distinct matters and causes, in several whereof, as appears by the said bill, this defendant is not in any manner interested or concerned, and that the bill is altogether multifarious.

Wherefore, etc. (*Conclude as in No. 24, and add certificate No. 24.*)

An objection that a bill is multifarious should be raised by demurrer.¹

The objection of multifariousness when not taken by demurrer may be disregarded if after a full hearing complete justice can be done to all parties.² One as against whom there is a misjoinder of claims can not demur on the ground that the bill is multifarious.³ The objection of multifariousness can not be considered for the first time on appeal.⁴

No. 26. Demurrer for want of parties.

(*Commence as in No. 23, ante, to the *, and state cause of demurrer as follows:*) That it appears by the complainant's bill, that G H, therein named, is a necessary party to the said bill, inasmuch as it is therein stated that E F, the testator in the said bill named, did, in his lifetime, by certain conveyances made to the said G H, in consideration of ——— dollars, convey to him by way of mortgage, certain estates, in the said bill particularly mentioned and described, for the purpose of paying the said testator's debts and legacies; but the complainant has not made the said G H a party to said bill.

Wherefore, etc. (*Conclude as in No. 24, and add certificate No. 24.*)

No. 27. Demurrer for want of privity.

(*Commence as in No. 23, ante, to the *, and state cause of demurrer as follows:*) That it appears by the complainant's said bill, that there is no privity between the complainant and this defendant, to enable the complainant to call upon this defendant for the payment of any debt due to the estate of the said testator from this defendant.

Wherefore, etc. (*Conclude as in No. 23.*)

No. 28. Demurrer to a bill of discovery, where the defendant could be examined as a witness.

(*Commence as in No. 24, ante, to the *, and state cause of demurrer as follows:*) That the complainant has not, in and by his said bill, stated, charged or shown, that this defendant has, or pretends to have, any right, title or interest in the matters and things complained of by the said bill, or any of them; or any right to call upon this defendant, in a court of equity,

¹ *Snook v. Pearsall*, 95 Mich. 534.

² *Torrent v. Hamilton*, 95 Mich.

³ *Burnham v. Dillon*, 100 Mich. 159.

352.

⁴ *Richardson v. Richardson*, 59 N. W. Rep. 178; 100 Mich. 364.

for a discovery of said matters and things, or any of them. And that for anything that appears to the contrary by said bill, this defendant may be examined as a witness in this suit.

Wherefore, etc. (*Conclude as in No. 23 and add certificate No. 24.*)

No. 29. Demurrer to a bill, where the complainant has no interest in the subject.

(*Commence as in No. 23, ante, to the *, and state cause of demurrer as follows:*) That the complainant has not, as appears by his said bill, made out any title to the relief thereby prayed.

Wherefore, etc. (*Conclude as in No. 23, and add certificate No. 24.*)

No. 30. Demurrer to a part of the bill.

This defendant as to so much of said bill as seeks that this defendant may answer and set forth whether, etc. (*state the matter demurred to,*) or seeks any discovery from this defendant, whether, etc. (*setting out the interrogatory,*) demurs thereto, and for cause of demurrer shows that, etc. (*Here set forth the cause of demurrer,*) as to the matters hereinbefore specified, or any of such matters.

Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, as to so much thereof as before is set forth, this defendant demurs and prays the judgment of this honorable court whether he shall be compelled to make any further answer to such parts of the said bill as is so demurred to as aforesaid.

By — Sol. for Defendant.

(*Add certificate No. 24.*)

No. 31. Demurrer to part of a bill with an answer to the residue.

(*Proceed as in last form, No. 30, to the end, and continue as follows:*) And this defendant not waiving his said demurrer, but relying thereon, and saving and reserving unto himself all benefit and advantage of exception to the many errors, uncertainties and other imperfections in the residue of the said bill contained, this defendant for answer says, etc.

(*Continue as in form of an answer, No. 66, post.*)

SECTION III.

PLEA TO A BILL.

Nature of.—When an objection to a bill in chancery is not apparent on the bill itself, or, as the technical phrase is, *dehors* the bill, if the defendant means to take advantage of it, he must show the matter which creates the objection, to the court by a plea, or by answer.¹ In some cases the objection

¹ Story's Eq. Pl. § 647; Mitf. Eq. Pl. 219.

can be taken only by a plea; in others, again, it may be taken either by a plea or by answer; and in others, again, it can be taken only by answer.¹ In other words, the defendant may demur to one part of the bill, plead to another, answer to another, and disclaim as to another, if the nature of his case requires it, in the same manner as he may demur, or plead, or answer to the whole bill, if his defense equally applies to all parts thereof.²

But he can not demur to the whole bill, plead to the whole bill and answer to the whole bill at the same time. If that be done, the plea waives the demurrer, and the answer waives the plea.³

Chancery Rule 8 provides that the defendant may plead to the whole or any part of the bill, but in every case in which the bill specially charges fraud or combination, a plea to such part must be supported by an answer explicitly denying the fraud and combination and the several facts on which the charge is founded.⁴

Pleas are usually divided into two sorts; one commonly called pure pleas, which contain matter wholly *dehors* the bill, such as a release, or a settled account; and another, called, in contradistinction to the other, pleas not pure, or anomalous pleas, and most generally negative pleas, which consist mainly of denials of the substantial matters set forth in the bill.⁵

The true office of a plea is to save to the parties the expense of an examination of the witnesses at large; and the defense proper for a plea is such as reduces the cause, or some part of it, to a single point, and from thence creates a bar or other obstruction to the suit, or to the point, to which the plea applies.⁶ Therefore a plea, to be good, whether it be affirm-

¹ Story's Eq. Pl. §§ 439, 647; *Aggas v. Pickervill*, 3 Atk. 226; *Harris v. Pollard*, 3 P. Wms. R. 348; *Coop. Eq. Pl.* 302; see *Rowe v. Tweed*, 15 Ves. 377.

² *Dowes v. McMichael*, 6 Paige Ch. R. 383; *Lord Red.* 214; *Story's Eq. Pl.* § 647; *Mitf. Eq. Pl.* 319; *Beard v. Bowler*, 2 Bond, 13.

³ *Crescent Co. v. Butcher*, 12 Fed. Rep. 225; *Ferguson v. O'Hara*, 1 Pet.

C. C. 493; *Clark v. Bank*, Harr. Ch. 240; *Clark v. Bank*, Walk. Ch. 240.

⁴ See *Sims v. Lyle*, 4 Wash. C. C. 301; *Ferguson v. O'Hara*, 1 Pet. C. C. 494; *Lewis v. Baird*, 3 McLean, 56.

⁵ *Story's Eq. Pl.* §§ 667, 651; *Sanders v. King*, 6 Mad. R. 61; *Pennington v. Beachy*, 2 Sim. & Stu. R. 274, 276; 2 Dan. Ch. Pr. 99, 100, 110, 111.

⁶ *Story's Eq. Pl.* § 652; *Mitf. Eq.*

ative or negative, must be either an allegation or a denial of some leading fact, or of matters which, taken collectively, make out some general fact, which is a complete defense.¹ But, although a defense, offered by way of plea, should consist of a great variety of circumstances, yet, if they all tend to a single point, the plea may be good.² Where a defense consists of numerous facts and circumstances, making it necessary to go into the examination of witnesses at large, it should be set up by answer, and not by plea.³

And where the allegations of a plea, being taken as true, do not make out a full defense, or where the necessary facts are to be gathered by inference alone, the plea will not be sustained.⁴ And where all the facts set up by the plea appear upon the face of the bill, the plea is bad.⁵

When proper.—The limit of this work will not justify much of its space to be taken up in considering this branch of the subject. The reader's attention is directed to other works, where the subject is treated of fully and at large.⁶

Pleas have been arranged under four classes: I, to the jurisdiction; II, to the person of the plaintiff; III, to the bill, or the frame thereof; and IV, in bar.

I. To the jurisdiction of the court.—A plea to the jurisdiction does not dispute the right of the complainant in the suit, but simply asserts either that his claim is not a fit subject of cognizance in a court of equity, or that some other tribunal is invested with the proper jurisdiction. It is difficult to disguise any case, which this plea would reach, so as to avoid a demurrer; but there may be instances to the contrary, and even averments in the bill, which would leave the

Pl. 295; *Coop. Eq. Pl.* 223; *Chapman v. Turner*, 1 Atk. R. 54; *Ritchie v. Aylwin*, 15 Ves. R. 82; *Rowe v. Tweed*, 15 Ves. 378; *Wood v. Rowe*, 2 Bligh. R. 595, 614; *Heartt v. Corning*, 3 Paige Ch. R. 566.

¹ *Robertson v. Lubbock*, 4 Sim. R. 161; *Salter v. Tobias*, 7 Johns. Ch. R. 214; 2 Dan. Ch. Pr. 102-104.

² *Story's Eq. Pl.* § 652; 2 Dan. Ch. Pr. 103; *Mitf. Eq. Pl.* 296; *Ritchie v. Aylwin*, 15 Ves. 82; *Dawson v. Pilling*, 16 Sim. R. 203.

³ *Loud v. Sergeant*, 1 Edw. Ch. R. 164.

⁴ *Meeker v. Marsh*, Saxon R. 198; see *Piatt v. Oliver*, 1 McLean, 295; *Lewis v. Baird*, 3 McLean, 56.

⁵ *Phelps v. Garow*, 3 Edw. Ch. R. 139; *Varick v. Dodge*, 9 Paige Ch. R. 149; *Fowler v. Lewis*, 3 A. K. Marsh. R. 443; *Cozine v. Graham*, 2 Paige Ch. R. 177.

⁶ See *Story's Eq. Pl.* § 647-837; *Coop. Eq. Pl.*; *Dan Ch. Pr.*; *Mitf. Eq. Pl.*; *Welf. Eq. Pl.*

defendant no other means of protecting himself. If, for example, a bill in the Circuit Court of the United States should allege that the complainants and defendants are citizens of different states, the defendant can only contest this fact by a plea to the jurisdiction. The court of chancery being one of general equity jurisdiction, a mere allegation of the want of jurisdiction is not sufficient; but the plea must show by what means the jurisdiction has been lost, and by what court it is possessed.¹

An exception to the jurisdiction, by denial of the fact of citizenship, must be taken by plea in abatement; it can not be insisted on by way of answer.² A defendant will not be allowed, by plea, to deny the citizenship of his co-defendant, so as to oust the jurisdiction, it being a personal privilege.³

II. **To the person.**—A plea to the person of the complainant merely disputes the ability of the complainant to sue, without putting in issue the subject-matter of the controversy. It may assert either that the complainant is an alien enemy, or that he is an alien, and the suit respects lands; or that the complainant is an infant, *feme covert*, lunatic, or bankrupt; or that he is not the person whom he pretends to be in his bill; or does not sustain the character which he assumes.⁴

The bankruptcy of the complainant, and non-joinder of his assignee, must be pleaded; it can not be insisted on by way of answer.⁵

III. **To the bill.**—Pleas to the bill, or the frame of the bill, bear a close resemblance to pleas in abatement of the action at common law. Without disputing the right of the complainant to the relief which he seeks, they allege that the suit, as it appears on the record, is insufficient to answer the purposes of complete justice, or ought not for some reason to proceed. The most usual of these pleas are either the pendency of another

¹ *Barton's Suit* in Eq. 103; *Burger v. Potter*, 32 Ill. 66; *Lester v. Stevens*, 29 Ill. 155; *Varick v. Dodge*, 9 Paige Ch. R. 149; see Story's Eq. Pl. § 710-721; *Emerson v. R. R. Co.*, 75 Ill. 176.

² *Wood v. Mann*, 1 Sumner, 578; *Livingston v. Story*, 11 Pet. 351; *Dodge v. Perkins*, 4 Mason, 435;

Burnham v. Rangeley, 1 W. & M. C. C. R. 7.

³ *Harrison v. Urann*, 1 Story, 64.

⁴ *Barton's Suit* in Eq. 103; Story's Eq. Pl. § 722-739; Mitf. Eq. Pl. 230; Beame's Pl. in Eq. 120-122; Coop. Eq. Pl. 249, 250; *Ord v. Huddleston*, 2 Dick. 510.

⁵ *Kittredge v. Bank*, 3 Story, 590.

suit for the same matter in another court of equity; or the want of proper parties to the bill.¹

IV. Pleas in bar.—Pleas in bar are usually divided into three heads: 1, pleas founded upon some defense created by statute, such as limitations, or the statute of frauds; 2, pleas founded on matter of record, such as a former decree; and 3, pleas of matters *in pais*, to which belong the plea of a stated account, of an award, of a release, of a purchase for a valuable consideration, and of title in defendant, obtained either by adverse possession for a length of time, or by deed or will.²

Frame of plea.—A plea is preceded by a title in this form: "The plea of C D, a defendant, to the bill of complaint of A B, complainant," or "The joint and several plea of C D and E F, defendants," etc. Where it is the plea of husband and wife, the words "and several" should not be inserted; though these words will not vitiate the plea, being mere surplusage.³

A plea, like a demurrer, is introduced by a protestation against the confession of the truth of any matter contained in the bill. It next states how much of the bill it is intended to cover, and what part in particular; and this must be clearly and distinctly shown.⁴ Therefore, a plea to such parts of the bill as are not answered, will be overruled as too general.⁵

A plea in bar must be accompanied by an answer, showing the truth of the plea, and denying the charges of the bill.⁶ And it is not sufficient to deny only a part of the material facts stated in the bill; a mere denial of facts is proper for an answer, but not for a plea.⁷

If the plea professes to go to the whole bill, and does, in fact, cover the whole subject to which the plea applies, and the matter is a full defense to the suit, it is unnecessary to answer other parts of the bill not involved in the subject which forms the ground of defense.⁸

¹ Barton's Suit in Eq. 103, 104; Story's Eq. Pl. § 735-835.

² Barton's Suit in Eq. 104; Story's Eq. Pl. § 748-778.

³ 1 Barb. Ch. Pr. 115; *Pavie v. A'Court*, 1 Dick. R. 13; Story's Eq. Pl. § 736-739.

⁴ Mitf. Eq. Pl. 294, 300.

⁵ *Anon*, 3 Atk. R. 70.

⁶ *Piatt v. Oliver*, 1 McLean R. 295; 8 N. H. 280; 5 Johns. Ch. 555.

⁷ *Milligan v. Milledge*, 3 Cranch R. 220.

⁸ *Sims v. Lyle*, Wash. C. C. Rep. 301.

A plea must be perfect in itself, so that, if true, it will make an end to the case.¹

Where the plea is of matter which shows an imperfection in the frame of the bill, it should point out in what that imperfection consists. Where, for instance, a plea is for want of parties, it must not only show that there is a deficiency of parties, but should point out who the parties are that are wanting.²

The plea commonly concludes with a repetition that the matters so offered are relied upon as an objection or bar to the suit, or so much of it as the plea extends to; and prays the judgment of the court whether the defendant ought to be compelled further to answer the bill, or such parts as are thus pleaded to.³

If the plea is double, that is to say, if it tenders more than one defense as the result of the facts stated, it will be bad.⁴ A plea is not rendered double, however, by the mere insertion therein of several averments, that are necessary to exclude conclusions arising from allegations which are made in the bill, to anticipate and defeat the bar which might be set up in the plea.⁵

The rule that a defendant can not plead double, is not to be understood as precluding the defendant from putting in several pleas to different parts of the same bill. It merely prohibits his pleading, without previous leave, a double defense to the whole bill, or to the same portion of it. A defendant may plead different matters to separate parts of the same bill, in the same manner as he may demur to different portions of the bill.⁶

In addition to the requisites of a plea already mentioned, it may be stated that a plea must be certain. It must tender issuable matter, the truth or falsehood of which may be replied

¹ *Allen v. Randolph*, 4 Johns. Ch. R. 693; see also *Bogardus v. Trinity Church*, 4 Paige Ch. R. 178.

² *Merrewether v. Mellish*, 13 Ves. 487-8.

³ Mitf. Eq. Pl. 300; 1 Barb. Ch. Pr. 116.

⁴ *Bank v. Dorr*, Wal. Ch. 317; *Car-*

roll v. Potter, Walk. Ch. 355; *Nobkissen v. Hastings*, 2 Ves. Jr. R. 84; *Jones v. Frost*, 3 Mad. 1, 8.

⁵ *Bogardus v. Church*, 4 Paige, Ch. R. 178; 1 Barb. Ch. Pr. 116.

⁶ 2 Dan. Ch. Pr. 105; *Moreton v. Harrison*, 1 Bland. 493; *Ridgeley v. Warfield*, 1 Bland. 194.

to or put in issue; and that not in the form of general propositions, but specifically and distinctly.¹

Where the plea is accompanied by an answer, the answer must follow the conclusion of the plea. If the answer is merely to support the plea, it is stated to be made for that purpose, "not waiving the plea." If the plea is to part of the bill only, and there is an answer to the rest, it is expressed to be an answer to so much of the bill as is not before pleaded to; and is preceded by the same protestation against waiver of the plea.² If the plea is such that an answer is required to support it, it will be overruled, unless such answer is put in.³

Chancery Rule 8 provides that no plea shall be allowed to be filed to any bill, unless upon a certificate of counsel that in his opinion it is well founded in point of law, and unless supported by the affidavit of the defendant; that it is not interposed for delay merely, and that he knows, or has good reason to believe, it to be true in point of fact.

The certificate of counsel therein required may be in the following form:

No. 32. Certificate of counsel that plea is well founded.

(Following the plea add.)

I certify that in my opinion the foregoing plea of C D, defendant to the bill of complaint of A B, complainant, is well founded in point of law and proper to be filed in the above cause.

Solicitor for defendant.

The affidavit of the defendant that the plea is not interposed for delay, may be in the following form:

No. 33. Affidavit of defendant that a plea to a bill is not interposed for delay, and is true in fact.

(Following the certificate of counsel add:)

STATE OF MICHIGAN }
County of _____ } ss.

C D, the defendant, on oath states that he has heard read the foregoing plea to the bill of complaint of A B in this suit; that the same is not inter-

¹ *Parker v. Parker*, Walk. Ch. 457;
Nabob of Arcott v. East I. Co., 3
Bro. C. C. 292; 1 Barb. Ch. Pr. 117;
Allen v. Randolph, 4 Johns. Ch. R.
693.

² Mitf. Eq. Pl. 300; 1 Barb. Ch. Pr.
117.

³ *Schwarz v. Wendell*, Harring,
Ch. R. 395; 1 Gill & J. 270.

posed for the purpose of delaying said suit, or any proceedings therein: and that he knows (*or has good reason to believe*) it to be true in point of fact.

C D.

Subscribed, etc.

FORMS OF PLEAS.

No. 34. Commencement and conclusion of pleas to the whole bill.

STATE OF MICHIGAN.

The Circuit Court for the County of ———. In Chancery.

A B,	}
Complainant,	
	v.
C D,	}
Defendant.	

The plea of C D, defendant, to the bill of complaint of A B, complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the complainant's said bill mentioned to be true, in such manner and form as the same are therein and thereby set forth and alleged, doth plead thereunto, and for plea says, *that, etc. (*Here set forth the subject-matter of the plea, and conclude as follows:*) All which matters and things this defendant avers to be true, and pleads the same to the whole of the said bill, and demands the judgment of this honorable court whether he ought to be compelled to make any answer to the said bill of complaint; and prays to be hence dismissed, with his reasonable costs in this behalf most wrongfully sustained.

By ———, Solicitor for Deft.

(*Add certificate of counsel and affidavit.*)

No. 35. Commencement and conclusion of pleas to part of a bill.

(*Title of cause.*)

The plea of C D, defendant, to the bill of complaint of A B, complainant.

This defendant, by protestation, not confessing or acknowledging the matters and things in and by said bill set forth and alleged to be true, in such manner and form as the same are thereby and therein set forth and alleged, for plea to so much and such parts of said bill as prays, etc. (*or seeks a discovery from this defendant,*) says that, etc.

(*Here set forth the subject-matter of the plea, and conclude as follows:*)

Therefore, this defendant doth plead the same in bar to so much of the said complainant's bill as hereinbefore is particularly mentioned; and prays the judgment of this honorable court whether he should be compelled to make any further answer to so much of the said bill as is hereinbefore pleaded to, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

No. 36. Plea in abatement to the jurisdiction of the court.

(*Commence as in No. 34, ante, to the *.*) That these defendants, and each and all of them, before and at the time of filing of the complainant's

bill of complainant, were, and still are, residents of the county of —, in said state; that neither of these defendants, at the time of filing said bill, was a resident of the county of —, where said bill was filed; that the said suit in no manner affects or relates to real estate in the county where the same was exhibited as aforesaid.

Therefore, etc. (*Conclude as in No. 34, and add certificate of counsel and affidavit.*)

The above plea is framed with reference to the statute of Michigan, which provides that suits in chancery shall be commenced in the county where the defendants, or some one or more of them reside; or if the defendants are all non-residents, then in any county; or if the suit may affect real estate, then in the county where the same, or some part thereof, is situated. Bills for injunction to stay proceedings at law, shall be brought in the county in which the proceedings at law are had.

No. 37. Plea of coverture of the complainant.

(*Commence as in No. 34, ante, to the *.*) That the complainant, before and at the time of filing her said bill, was, and now is, under coverture of one B B, her husband, who is still living, and in every respect capable, if necessary, of instituting any suit at law, or in equity on her behalf.

Therefore, etc. (*Conclude as in No. 34.*)

In Michigan, a married woman may sue in her own name, without joining the husband, in matters pertaining to her separate property.¹

No. 38. Plea of infancy without a prochein amy.

(*Commence as in No. 34, ante, to the *.*) That the complainant, before and at the time of filing his said bill, in which he appears as sole complainant, was and now is, an infant under the age of twenty-one years; that is to say, of the age of — years, or thereabouts.

Wherefore, etc. (*Conclude as in No. 34.*)

No. 39. Plea that the defendant never was administrator, as alleged in bill.

(*Commence as in No. 34, ante, to the *.*) That he is not, and never has been, administrator of the goods and chattels, rights and credits, which were of the said E F, deceased, in the said bill named, as the complainant in his said bill has untruly alleged.

Wherefore, etc. (*Conclude as in No. 34.*)

No. 40. Plea that the complainant is an alien enemy.

(*Commence as in No. 34, ante, to the *.*) That the complainant, A B, is alien, born of foreign parents, and in foreign parts, that is to say, at Liver-

¹How. Stat. § 6297.

pool, in the kingdom of Great Britain, and out of the United States of America, and under the allegiance of the Queen of Great Britain, who is an enemy of the United States, and to whom the parents of the complainant adhere; and the complainant also before, and at the time of filing his said bill, was, and now is, an enemy of the United States, and entered into the United States with the safe conduct of the government of the United States, and has not been made a subject or citizen of the United States, by naturalization or otherwise.

Wherefore, etc. (*Conclude as in No. 34.*)

No. 41. *Plea of want of proper parties.*

(*Commence as in No. 34, ante, to the *.*) That as to so much of the complainant's bill as seeks an account from this defendant, as executor and heir-at-law of E F, deceased, in the said bill named, this defendant's late brother, for what remains due and owing upon the bond in the said bill mentioned, bearing date on, etc., and payment by this defendant as such executor and heir-at-law of the said E F, deceased, as aforesaid, of what he found due on taking such account, this defendant doth plead thereto, and for plea says, that no part of the sum of — dollars, for securing the repayment whereof the said bond was executed, was paid to, or secured by the said E F, but that the whole was paid to G H, in the said bond and in the said bill also named, and received by him for his sole use, and that the said E F was only a surety for the said G H, and that the complainant afterward accepted a composition for what he alleged to be due on the said bond from the said G H, without the privity of the said E F in his lifetime, or this defendant since the death of the said E F, which took place on or about, etc., as in the said bill mentioned, since which no demand has been made on this defendant for any money alleged to be due on the said bond; and that the said G H died several years ago, seized of considerable real estate, and also possessed of a large personal estate; and that his heir-at-law, or the devisee of his real estate, and also the representative of his personal estate, ought to be, but are not made parties to the said bill.

Therefore, etc. (*Conclude as in form No. 34.*)

No. 42. *Plea of former adjudication.*

(*Commence as in No. 34, ante, page 87, to the * and then continue as follows:*)

That after the matters and things alleged in complainant's bill, and before the commencement of this suit, to wit, on, etc., in the circuit court of the county of —, one E F filed his bill in chancery against this defendant and one G H, charging, etc., (*Here insert the subject-matter of the suit.*) and such rights and interests therein, as he now claims by his present bill; and praying relief against this defendant in the same manner, and for the same matters, and to the same effect as the complainant now prays by his said present bill; and that this defendant and the said G H appeared and put in their answer to the said former bill, and the complainant replied thereto; and evidence being taken in said former suit relating to the matters in controversy, and the said cause coming on for hearing before said court, a final decree was, on, etc., rendered therein, in form and effect fol-

lowing: (*Here insert the findings and decree in former case*) and that the said former bill and the said several proceedings and final decree in the said former suit still remained determined and in full force and effect.

Wherefore, etc. (*Conclude as in No. 34.*)

No. 43. Order of reference of plea of former adjudication.

(*Caption and title of cause as in No. 34, ante, page 87.*)

The defendant having filed a plea in this cause averring that there was a former adjudication in this court, between the same parties, of the same matters as are involved in the present suit, it is ordered that this cause be, and the same is hereby referred to J M D, circuit court commissioner, to look into the bill and plea in this cause, and the said former bill in the said plea mentioned as having been exhibited by the complainant, and determined against the defendant previous to the commencement of this suit, and into the other pleadings and proceedings therein, and to report whether the said plea is true.

Former adjudication.—The value of a plea of former recovery does not depend upon the reason given by the court rendering the decree or judgment.¹ Nor is such former judgment or decree conclusive only as to questions actually and finally litigated. It is conclusive as to all questions within the issue whether formerly litigated or not.²

A decree settling adverse interests of two defendants in a chancery suit, when they have had a hearing on the merits, and an opportunity of ascertaining their respective claims, will conclude them as fully as if the suit had been brought by the one against the other, so far as it affects rights presented to the court and passed upon.³

The doctrine of *res adjudicata* embraces not only what has been actually determined in the former suit, but also extends to any other matter properly involved, and which might have been raised and determined in it. Therefore, a decree on the

¹ *Giardin v. Dean*, 49 Texas, 243; *Greathead v. Bromley*, 7 Term R. 456; *Barrett v. Failing*, 8 Oregon, 152; *Freeman on Judgments* (3d Ed.), Sec. 275; *Davis v. Talcott*, 12 N. Y. 184.

² *Harmon v. Auditor*, 123 Ill. 133; *Rogers v. Higgins*, 57 Ill. 244; *Reugger v. Railroad Co.*, 103 Ill. 449; *Aurora City v. West*, 7 Wall. 82;

Preble v. Board of Supervisors, 8 Biss. U. S. C. C. R. 358.

³ *Harmon v. Auditor*, 123 Ill. 122; *State v. R. R. Co.*, 13 Sou. Car. 290; *Terry v. Town*, 35 Conn. 526; *Sabin v. Sherman*, 28 Kansas, 283; *Smith v. Swormstedt*, 16 How. 303; *Corcoran v. Canal Co.*, 94 U. S. 741; *Louis v. Brown Township*, 109 U. S. 162; *Scotland Co. v. Hill*, 112 U. S. 183; *Black v. Miller*, 75 Mich. 323.

merits is conclusive as to all defenses that might have been interposed.¹

Where an issue of fact is finally determined by a court of competent jurisdiction, its findings and determinations are final and conclusive upon the parties and their privies in all subsequent litigation between them in which the same question arises, so long as the judgment or decree remains in full force, unreversed and not otherwise satisfied.²

Former adjudication should be set up by plea,³ and such plea will be sufficient without reciting all the allegations of the former bill; but so much of the former bill and answer must be set forth as is necessary to show that the same point was then in issue.⁴

No. 44. Former suit pending.

(Commence as in No. 34, ante, to the *.) That ———, on, etc., the said present complainant exhibited his bill of complaint in this honorable court against this defendant and one E F, for an account of the moneys raised by the sale of the goods and property in the complainant's present bill mentioned, and claiming such shares and proportions thereof, and such rights and interests therein, as he now claims by his present bill; and praying relief against this defendant in the same manner, and for the same matters, and to the same effect as the complainant now prays by his said present bill; and this defendant and said E F appeared and put in their answer to the said former bill, and the complainant replied thereto; and the said former bill, and the several proceedings in the said former cause now remain depending, and as of record in this honorable court, the said cause being yet undetermined and undismissed.

Wherefore, etc. (Conclude as in No. 34.)

A plea to a bill in equity, that there is another suit pending in the same court, for the same cause, is good only when the whole of the relief sought in the second suit is attainable in the first.⁵

¹*Bennett v. Mining Co.*, 119 Ill. 10; *Hamilton v. Quimby*, 46 Ill. 90; *Kelly v. Dolin*, 70 Ill. 378; *Reugger v. R. R. Co.*, 103 Ill. 449; *Schumick v. Thompson*, 25 Ill. App. Ct. R. 619; *Windett v. C. Life Ins. Co.*, 27 Ill. App. Ct. R. 63; *Swantz v. Muller*, Id. 320; see *Wilmarth v. Woodcock*, 66 Mich. 331.

²*Umlauf v. Umlauf*, 117 Ill. 580; *Jenkins v. International Bank*, 111

Ill. 462; *Cochran v. Folger*, 116 Ill. 194; *Gage v. Ewing*, 107 Ill. 11; *McCartney v. Osborn*, 118 Ill. 405.

³*Thrifts v. Fritz*, 101 Ill. 457; *Gage v. Bailey*, 102 Ill. 11; see *Garrick v. Chamberlain*, 97 Ill. 620.

⁴*Gage v. Ewing*, 107 Ill. 11; *Story's Eq. Pl. § 791*; *Dan. Ch. Pr. 661*; see *Union National Bank v. International Bank*, 123 Ill. 510.

⁵*McKaig v. Piatt*, 34 Md. 249.

A plea of the former suit pending in another court for the same cause of action must set forth the general character and objects of the former suit, and the relief prayed for.¹

A plea that complainant has parted with his interest in the suit is a good defense.²

No. 45. Plea of the statute of limitations.

(Commence as in No. 34, ante, to the *.) That if the complainant, either in his own right or as executor of E F, deceased, in the bill named, ever had any cause of suit against him, this defendant, for or concerning any the matters, transactions or dealings in the said bill of complaint mentioned, which this defendant doth in no sort admit, the same did accrue or arise above — years before the said bill of complaint was exhibited in this honorable court; and this defendant further for plea says, and doth aver, that he did not at any time within — years before the filing of the complainant's said bill of complaint, ever promise or agree to come to any account for, or to pay, or any way satisfy the complainant any money, for or concerning any the matters, transactions, or dealings in the complainant's said bill of complaint charged or alleged.

Therefore, etc. (Conclude as in No. 34.)

The statute of limitations does not apply to a cause of action fraudulently concealed from the injured party, who may file his bill at any time within two years after the discovery of his rights and the deceit practiced upon him.³

No. 46. Plea of a release, with answer in support of the same.

(Commence as in No. 34, ante, to the *.) That as to so much and such part of the complainant's bill as seeks an account of the several dealings and transactions between the complainant and this defendant, previously and up to the — day of —, etc., and prays the balance, if any, which shall be found due, upon taking such account, from this defendant, may be paid by him to the complainant, this defendant doth plead thereto, and for plea says, that previous to the filing of the complainant's bill, that is to say, on, etc., the complainant in consideration of the sum of — dollars, then paid to him by this defendant, by a certain writing of release, under his hand, and sealed with his seal, ready to be produced to this honorable court, did for himself, his executors, and administrators, remise, release, and forever quit-claim unto this defendant, his heirs, executors and administrators, among other things, the several matters and things in the complainant's

¹ *Bank v. Williams*, Walk. Ch. R. 219; *Story's Eq. Pl.* 570.

² *Wallace v. Dunning*, Walk. Ch. 416; *Webster v. Hitchcock*, 11 Mich. 56; *Brewer v. Dodge*, 28 Mich. 359; *Perkins v. Perkins*, 16 Mich. 162.

³ *Tompkins v. Hollister*, 60 Mich. 470; How. Stat. §§ 8724, 8726; *Breit v. Yeaton*, 101 Ill. 245; *Clapp v. Peterson*, 104 Ill. 27; *Jones v. Lloyd*, 117 Ill. 598.

bill mentioned and complained of, an account whereof is thereby sought against this defendant as aforesaid, and all suits and demands whatsoever, both at law and in equity, which the complainant thus had, or might thereafter have in respect of the several dealings and transactions, matters and things, in the said bill mentioned, or any of them; and this defendant avers, that the said release was freely, fairly and voluntarily given and executed by the complainant, on the day the same bears date; and that the complainant well knew the nature and effect thereof previously to giving and executing the same; and that the sum of — dollars so paid by this defendant to the complainant as aforesaid, was a full and fair equivalent for any demand which the complainant could or might have against this defendant in respect of the several matters therein, and in the said bill also mentioned, or any of them.

Therefore this defendant pleads the said release in bar to so much of the complainant's bill as is hereinbefore particularly mentioned, and prays the judgment of this honorable court, whether he ought to be compelled to make any further answer to so much of the said bill as is before pleaded unto.

And this defendant not waiving his said plea, but insisting thereon, for answer to the residue of the said bill, and in support of his said plea, says he denies that the said release was unduly obtained by this defendant from the complainant, or that the complainant was ignorant of the nature and effect of such release, or that the consideration paid by this defendant to induce the complainant to execute the same, was all inadequate to the just claims and demands of the complainant against this defendant, in respect to the several dealings and transactions in the said bill mentioned, or any of them; and this defendant denies, etc., etc. (*Here insert any other denial or allegation that the case may require, and add affidavit of the truth of the plea and answer.*)

A plea of a release, if unsupported by an answer, is insufficient.¹

No. 47. Plea of a stated account.

(*Commence as in No. 34, ante, to the *.*) That as to so much and such part of the complainant's bill as seeks an account of and concerning the dealings and transactions therein alleged to have taken place between the complainant and this defendant, at any time before the — day of —, A. D. 18—, this defendant for plea thereto, says that on the said — day of —, A. D. 18—, which was previously to the said bill being filed, the complainant and this defendant did make up, state, and settle an account, in writing, a counterpart whereof was then delivered to the complainant, of all sums of money which this defendant had before that time, by the order and direction, and for the use of the complainant received, and of all matters and things thereunto relating, or at any time before the said — day of —, A. D. 18—, being or depending between the complainant and this defendant, and in respect whereof the complainant's said bill of

¹ *Swartz v. Wendell*, Walk. Ch. Lef. 721. For form of plea and answer, see *ante*, page 92.

complaint has since been filed; and the complainant, after a strict examination of said account, and every item and particular thereof, which this defendant avers, according to the best of his knowledge and belief, to be true and just, did approve and allow the same, and actually received from this defendant the sum of ——— dollars, the balance of the said account, which by the said account appeared to be justly due to him from this defendant; and the complainant thereupon, and on, etc., gave this defendant a receipt, or acquittance for the same under his hand, in full of all demands, and which said receipt or acquittance is in the words and figures following, that is to say (*Here set out receipt verbatim*); as by the said receipt or acquittance now in possession of this defendant, and ready to be produced to this honorable court, will appear.

Therefore, etc. (*Conclude as in the last precedent, varying the conclusion and answer, in support of the plea, to suit the case. Also, add affidavit of the truth of the plea.*)

A plea of a stated account must aver the accounts settled; all the dealings between the parties; that the accounts were just and fair, and due; and these averments must be supported by an answer to the same effect.¹

No. 48. Plea to part and answer to the residue of bill.

(Title court and cause as in No. 34.)

The plea of C D, defendant, to part, and the answer of the same defendant to the residue of the bill of complaint of A B, complainant.

This defendant, to all the relief sought by the said bill, and also, to all the discovery thereby sought, except the discovery sought by or in respect of (so much of the said bill as prays that this defendant may answer and set forth,) whether etc., (*here the language of the interrogatories which it is necessary to answer, must be introduced,*) this defendant does plead in bar, and for plea says, etc. (*Here set out the plea.*)

All of which matters and things this defendant does aver to be true, and does plead the same in bar to the whole of the said bill, except such part of the discovery thereby sought as aforesaid; and this defendant prays the judgment of this honorable court, whether he ought to be compelled to make any further or other answer to so much of the said bill as is hereby pleaded to, and he prays to be hence dismissed with his costs.

And for answer to such parts of the said bill as are excepted, this defendant says, that, etc. (*Here insert answer as in precedents, under head of answers.*)

Signing of plea.—A plea must be signed by the party as well as counsel; but where it is not sworn to, the signature of counsel is sufficient.²

¹ *Swartz v. Wendell*, Walk. Ch. R. 395; *Roche v. Morgell*, 2 Sch. & Lef. 726; *Mitf. Eq. Pl.* 262, *et seq.*

² 1 Barb. Ch. Pr. 117; *Simes v. Smith*, 4 Mad. 366.

When to be filed.—A plea being the second in the order of pleading, it may be filed, when to the whole bill, at any time before answering.

Replication to plea.—If the complainant regards the plea, though good in form and substance, not true in point of fact, he may take issue upon it by filing a replication, and proceed to examine witnesses, as in the case of an answer, to disprove the facts upon which it is endeavored to be supported.¹ The effect of filing a replication to a plea is, that the complainant admits the plea to be good, and the truth of the matter alleged, is the only thing in question.² When the issue is thus taken upon the plea, the defendant must prove the facts it sets up.³ If he succeeds in proving the truth of the matter pleaded, the suit, so far as the plea extends, is barred.⁴ It puts in issue nothing except what is distinctly averred in the plea.⁵

If no replication is filed to the plea the truth of the plea is not in issue, but only its legal sufficiency.⁶

By replying to a plea to the whole bill instead of setting it down for argument its validity is admitted, and the only question left for trial is the truth of the facts alleged in the plea.⁷

Amendment of bill after plea.—If the complainant amends his bill after plea filed, it will be considered as an admission of the validity of the plea.⁸

Demurrer to plea not proper.—A demurrer to a defective plea should not be interposed. The proper practice is to notice the plea for hearing, when its sufficiency will be considered.⁹

¹ Chancery Rule 8; Mitf. Eq. Pl. 301-2; 1 Barb. Ch. Pr. 119; *Bank v. Wilson*, 4 Gilm. 57.

² *Ib.*; *Harris v. Ingledew*, 3 P. Wms. R. 95; *Daniels v. Taggart*, 1 Gill & J. R. 311; *Hulburt v. Britain*, Walk. Ch. 455.

³ 2 Ves. R. 247; *Ord v. Huddleston*, Dick. 510.

⁴ *Wichalse v. Short*, 3 Bro. P. L. 558; *Hinde Pr. 225*; *Fish v. Miller*, 5 Paige Ch. R. 26; *Bogardus v. Trinity Church*, 4 Paige Ch. R. 178.

⁵ *Hulburt v. Britain*, Walk. Ch.

454; *Fish v. Miller*, 5 Paige Ch. R. 26; 1 Barb. Ch. Pr. 119; *Bogardus v. Trinity Church*, 4 Paige Ch. R. 178.

⁶ *Railroad Co. v. McCamber*, 66 N. W. Rep. 472; *Shafer v. Thompson*, 109 Mich. 463.

⁷ *Little v. Stephens*, 82 Mich. 596.

⁸ *Spencer v. Bryan*, 9 Ves. R. 231; 1 Barb. Ch. Pr. 120; *Freeman v. Bank*, Har. Ch. 311.

⁹ *Lester v. Stevens*, 29 Ill. 155; *Thomas v. Brashear*, 4 Monr. R. 65. See Chan. Rule 8.

Argument of plea—Dismissal of bill.—Chancery Rule 8 provides that the complainant may set down the plea to be argued, or he may take issue on the plea, and in default of the complainant taking any action within twenty days, the defendant shall be entitled as of course to a decree dismissing the bill, or so much thereof as is covered by the plea, unless the court shall allow the defendant further time for the purpose.

Default of defendant in answering.—Said Rule 8 further provides that if upon argument the plea is overruled, the defendant shall be required to answer within such time as the court shall deem reasonable; and if the defendant makes default, the bill, or so much thereof as the plea covered, shall be taken *pro confesso*, and the matter thereof proceeded in and decreed accordingly.

Effect of allowing plea—Replication—Amendment.—It is further provided by said Rule 8 that if upon argument the plea is allowed, the complainant may within ten days after notice of such allowance, take issue upon the payment of the costs of hearing thereon, unless he shall within such ten days move for leave to amend the bill, on which motion the court may allow such amendment on such terms as it may deem reasonable. Within ten days after the determination of such motion for leave to amend, the complainant may take issue on the plea upon the terms above provided. In default of such motion for leave to amend, or in case such leave is denied, and in default of taking issue on the plea, the bill, or so much thereof as is covered by the plea, shall be dismissed.

If, upon argument, a plea is allowed, it is thereby determined to be a full bar to so much of the bill as it covers, if the matter pleaded, with the averments necessary to support it, be true. If, therefore, the plea is allowed, the complainant may take issue on the plea by replying to it, on payment of the costs of the hearing thereupon.¹

If the complainant files a replication to the plea, the defendant will be obliged to prove the truths of the fact set up in the plea.² If the complainant omits to file a replication in such a case, not only the validity of the plea as a bar is admitted,

¹ *Hulburt v. Britain*, Walk. Ch. 454; 1 Barb. Ch. Pr. 121; Story's Eq. Pl. § 697.

² Mitf. Eq. Pl. 302.

but the truth of the facts set up in it; and of course the suit is at an end.'

If the plea has been replied to, the complainant may, if he desires, go into evidence to disprove it; and if he has, in his bill, alleged any matter which, if true, may have the effect of avoiding the plea, such as notice, fraud, etc., he may examine any witnesses he may have to support his allegation. And where the plea introduces matters of a negative nature, such as denial of notice, fraud, etc., it will be necessary for him, in case sufficient is not admitted by the answer in support of the plea, to show the existence of the notice or fraud, to go into evidence in support of the affirmative of the proposition.²

Finding on facts stated in plea—Effect.—It is further provided by said Rule 8 that if, upon an issue, the facts stated in a plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him; if the facts are determined for the complainant, the effect shall be the same as though the bill, or so much thereof as is covered by the plea, was taken *pro confesso*.

Saving the benefit of a plea to the hearing.—It sometimes happens that upon the argument of a plea, the court considers that, although so far as then appears, it may be a good defense, yet there may be matters disclosed in evidence which, supposing the matter pleaded to be strictly true, would avoid it. In such a case the court, in order that it may not preclude the question of allowing the plea, directs that the benefit of it shall be saved to the defendant at the hearing.³

The effect of an order for this purpose is to give the complainant an opportunity of replying and going into evidence without overruling the plea.⁴ And when the benefit of the plea is reserved to the hearing, such parts of the bill as are covered by the plea are not to be answered,⁵ and neither party recovers cost until the hearing.⁶

¹ 1 Barb. Ch. Pr. 121.

² 1 Barb. Ch. Pr. 121; *Eyere v. Dolphin*, 2 Ball & B. R. 303; *Saunders v. Leslie*, 2 Ball & B. 515.

³ Mitf. Eq. Pl. 303; *Astley v. Fountaine*, Finch R. 4; 1 Barb. Ch. Pr. 121-2; Story's Eq. Pl. § 696-700.

⁴ *Cooth v. Jackson*, 6 Ves. 12, 18.

⁵ Gilb. For. Rom. 64.

⁶ *Heartt v. Corning*, 3 Paige Ch. R. 566; 1 Barb. Ch. Pr. 122; see *Payne v. Avery*, 21 Mich. 524.

Allowing plea to stand for answer.—When a plea is permitted to stand for an answer, it is determined that it contains matter which, if put in the form of an answer, would have constituted a valid defense to some material part of the matters to which it is pleaded as a bar, but that it is not a full defense to the whole matter which it professes to cover, or that it is informally pleaded, or is improperly offered as a defense by way of plea, or that it is not properly supported by answer. But a plea which sets up no valid defense to any part of the matter it professes to cover, will not be permitted to stand for answer.¹

When plea must be supported by answer.—Where there is any statement or charge in the bill which affords an equitable circumstance in favor of the complainant's case, against the matter pleaded, such as fraud or notice of title, that statement or charge must be denied by way of answer, as well as by averments in the plea.²

In general, an answer in support of a plea can not be required in those cases where such negative averments as those above stated are not necessary. When the defense can be made by a *pure* plea, that is, a plea which merely suggests matter in avoidance of the complainant's right to sue, as stated in the bill, an answer in support of the plea is not required. In such a case, the defendant, by his plea, admits the complainant's case; and so full and complete is the admission, that if, after argument, issue be joined upon the truth of the plea, and the plea be found false, there is an end to the dispute, and the complainant is entitled to a decree upon this implied admission of his case.³

The cases in which it is necessary that a plea should be supported by answer have been very conveniently divided into, *first*, those where the complainant admits the existence of a legal bar, and charges some equitable circumstances to avoid its effect; and, *second*, those where the complainant does not

¹ *Orcutt v. Orms*, 3 Paige Ch. R. 459; *Leacraft v. Dempsey*, 4 Paige Ch. R. 124; Mitf. Eq. Pl. 303; *Lube's* Eq. Pl. 46; 1 Barb. Ch. Pr. 122; *Sellen v. Lewen*, 3 P. Wms. R. 239; *Story's* Eq. Pl. § 696-700.

² 1 Barb. Ch. Pr. 128; Mitf. Eq. Pl. 239, 244.

³ 1 Barb. Ch. Pr. 128; *Wigram* on Disc. 36; *Wood v. Strickland*, 2 Ves. & B. 158; 2 Dan. Ch. Pr. 99, 100; *Story's* Eq. Pl. § 670.

admit the existence of any legal bar, but states some circumstances which may be true and to which there may be a valid ground of plea, together with other circumstances which are inconsistent with the substantial validity of a plea.¹

An answer in support of a plea is no part of the defense. The defense is the matter set up by the plea; the answer is that evidence which the complainant has a right to require and to use, to invalidate the defense made by the plea; and the complainant is entitled to make use of it, not only upon the hearing of the cause, upon the issue raised by the plea, after the plea shall have been decided to be a good bar upon argument, but upon the argument of the plea itself, before any evidence can be given;² for the purpose of counterproving the plea; by reading from it any facts or admissions which may negative the matters pleaded or averred in the plea.³

The answer in support of the plea being no part of the defense, but only what the complainant has a right to require to enable him to avoid that defense, it follows that it must be full and clear; otherwise it will not support the plea; for the court will intend all matters alleged in the bill, to which the complainant is entitled to an answer, to be against the pleader, unless they are clearly and fully denied.⁴

But although an answer in support of a plea is required to be full and clear, yet, if the equitable matters charged are fully and clearly denied, it may be sufficient to support the plea, although all the circumstances charged in the bill may not be precisely answered.⁵ In such cases, however, the complainant is not precluded by the circumstances of the court having held, upon the argument of the plea, that the charges in the bill are sufficiently denied to exclude intendment against the pleader, from afterward excepting to the sufficiency of the answer, in any point in which he may consider it defective.⁶

Where the complainant waives the necessity of an answer

¹ 1 Barb. Ch. Pr. 128; Hare on Disc. 30; Story's Eq. Pl. § 674-5.

² Mitf. Eq. Pl. 244, note; Story's Eq. Pl. § 671; *Foley v. Hill*, 4 Mylne & Craig, 475.

³ *Hildyard v. Cressy*, 3 Atk. 303; *Hony v. Hony*, 1 Sim. & Stu. 569; Story's Eq. Pl. § 672.

⁴ 1 Barb. Ch. Pr. 129; Mitf. Eq. Pl. 244; *Hildyard v. Cressy*, 3 Atk. R. 303.

⁵ Mitf. Eq. Pl. 299; *Waters v. Glanville*, Gilb. R. 184; 1 Barb. Ch. Pr. 129.

⁶ *Id.*

being put in on oath, if the defendant puts in a plea to the bill, he need not support it by answer.¹

SECTION IV.

ANSWER TO A BILL.

Nature of.—Where the case stated in a bill is not such as to render a resort to a demurrer or plea necessary or advisable, or if either of these methods of defense has been adopted, and the demurrer or plea overruled, either wholly or in part, the defendant, unless he disclaims, must answer fully all the material matters alleged and stated in the bill. He is not bound, however, to answer allegations which are purely scandalous, impertinent, immaterial or irrelevant;² nor anything which may subject him to a penalty, forfeiture or criminal prosecution;³ but if the defendant relies upon this objection, he should specially set it up as a ground for refusing the particular discovery in his answer.⁴ Nor is he bound to answer what would involve a breach of professional confidence.⁵ He is not compelled to discover the facts respecting his own title, but merely those which respect the title of the complainant.⁶ In each of these cases, if the defendant does not think proper to defend himself from a discovery by a demurrer, or by a plea, he has been permitted by answer to insist that he is not obliged to make the discovery. In each of these cases, the complainant may except to the defendant's answer as insufficient; and, upon that exception, it will be determined by the

¹ *Heartt v. Corning*, 3 Paige Ch. R. 566; see also *Story's Eq. Pr.* §§ 681, 682.

² *Story's Eq. Pl.* § 846; *Mitf. Eq. Pl.* 307, note (h), 316, note (q); *Davis v. Collier*, 13 Geo. R. 485; *Gilkey v. Paige*, Walk. Ch. 520.

³ *Adams v. Porter*, 1 Cush. R. 171; *Phillips v. Prevost*, 4 Johns. Ch. 205; *Butler v. Catling*, 1 Root, 310; *Legoux v. Waute*, 3 Har. & J. 184; *Brockway v. Copp*, 3 Paige Ch. R. 539; *Wolfe v. Wolfe*, 2 Har. & G. 382; *Hayes v. Caldwell*, 5 Gilm. 35.

⁴ *Adams v. Porter*, 1 Cush. 171;

Story's Eq. Pl. § 846; *Sloman v. Kelly*, 3 Younge & Coll. 673.

⁵ *Story's Eq. Pl.* § 846; *Strafford v. Hogan*, 2 Ball & Beatt. R. 164; *Greenough v. Gaskell*, 1 Mylne & Keen, 99; *Jones v. Pugh*, 12 Sim. 470; 1 Greenl. Ev. § 237; *Phillips v. Prevost*, 4 Johns. Ch. R. 205; *Foss v. Haynes*, 31 Maine, 81; *Leggett v. Postley*, 2 Paige Ch. 599.

⁶ *Story's Eq. Pl.* §§ 572, 825, 846; *Hare on Disc.* 268-273; *Wigram on Disc.* 21, 22, 111, 113, 147-149, 195, 196, 1st Ed.; *Id.* 261-346, 2d Ed.; *Story v. Randall*, 17 Ill. 467.

court whether the defendant is, or is not, obliged to make the discovery.¹

The answer generally traverses the allegations of the bill, or some of them, and alleges other facts and circumstances to show the rights of the defendant in the subject of the suit. Sometimes it admits the truth of the case made by the bill, and either with or without stating additional facts, submits the questions arising upon the case thus made to the judgment of the court. In all cases where relief is sought, an answer consists of two parts; *first*, the defense to the case made by the bill, and, *second*, the response of the defendant to the interrogatories of the complainant.²

Where a defendant submits to answer, he must make a full, frank and explicit disclosure of all matters material or necessary to be answered, with all their material circumstances, whether resting within his own knowledge, or upon his information and belief,³ or he must deny all knowledge with regard to it. If he has information, aside from the bill, he must state his belief.⁴ If the defendant has no information on the subject, he must state that he has no information, or is utterly ignorant of the fact;⁵ and if the information sought is within his reach, he is bound to obtain it, and state it in his answer.⁶ It will not be sufficient to allege that a third person who is interested in the suit, can prove the fact sought to be discovered.⁷

A fact alleged in the bill, and admitted in the answer, is established; but every fact alleged in the answer, in avoidance

¹ Mitf. Eq. Pl. 307, 308; Story's Eq. Pl. § 846.

² Barton's Suit in Eq. 106.

³ *Gilkey v. Paige*, Walk. Ch. 520; *Dan. Ch. Pr.* 487; Barton's Suit in Eq. 106; *Hagthorp v. Hook*, 1 Gill & J. 270; *Bank v. Messereau*, 7 Paige Ch. R. 517; *Supervisors v. R. R. Co.*, 21 Ill. 365; *Woods v. Morrell*, 1 Johns. Ch. R. 103; *Devereaux v. Cooper*, 11 Vt. 103; *Hopkins v. Medley*, 97 Ill. 403.

⁴ *Devereaux v. Cooper*, 11 Vt. 103; *Bradford v. Geiss*, 4 Wash. C. C. R. 513; *Brooks v. Byam*, 1 Story 226; *Smith v. Lasher*, 5 Johns. Ch. R. 247; *Bank v. Hyatt*, 2 Edw. Ch.

195; *Norton v. Warren*, 3 Edw. Ch. 106; *Robinson v. Woodgate*, 3 Edw. Ch. 422; *Neal v. Hagthorp*, 3 Bland, 551; *Bailey v. Wilson*, 1 Dev. & Bat. Ch. 182; *Sloan v. Little*, 3 Paige C. R. 103; *Champlin v. Champlin*, 2 Edw. Ch. 362; *Robertson v. Bingley*, 1 McCord Ch. 333; *King v. Ray*, 11 Paige Ch. R. 235; *Walker v. Walker*, 3 Kelley, 302; *Smith v. Loomis*, 1 Halst. Ch. (N. J.) 60; *Jones v. Hawkins*, 3 Ired. Eq. R. 110.

⁵ *Kittredge v. Bank*, 1 W. & M. 244.

⁶ *Swift v. Swift*, 13 Geo. 140.

⁷ *Bell v. Pomeroy*, 4 McLean, 57.

of such fact, must be proved like a plea, if the answer is traversed.¹ And where replication has been filed, allegations in the answer not responsive to anything in the bill, can not benefit the defendant at the hearing;² and if the answer is defective or evasive, it is a ground of exception, but not for an implied conclusion against the defendant.³

There is this difference in the systems of pleading in equity and at law; whatever is not admitted by the answer must be proved by the complainant, although it is not denied; whereas at law everything which is not denied is, by implication, admitted to be true.⁴

A mere general denial of confederacy and fraud, usual in an answer, is not sufficient, where particular acts of fraud are charged in the bill;⁵ and a demurrer to a bill containing such charges would be overruled.⁶

Where the defendant, in his answer, admits facts which render the transaction in question legally or constructively fraudulent, a general denial of fraud is unavailing;⁷ and the answer must positively and directly deny the allegations of the bill.⁸ If an answer is held to be insufficient, it is treated as no answer; and if the defendant neglects to make a sufficient answer, as ordered, the bill may be taken *pro confesso* and a final decree rendered.⁹

When a bill charges the defendant with notice of a particular fact, an answer must be given without a special interrogatory; but a defendant is not bound to answer an interrogatory not warranted by the charges in the bill,¹⁰ and what is responsive to a bill in the answer is to be determined by the bill, and not

¹ *McDonald v. McDonald*, 16 Vt. 630; *Hardwick v. Bassett*, 25 Mich. 149; *Emerson v. Atwater*, 12 Mich. 314.

² *Wakeman v. Grover*, 4 Paige Ch. R. 23. As to what is responsive to a bill, see *Mandeville v. Comstock*, 9 Mich. 536.

³ *Blaisdell v. Stevens*, 16 Vt. 179; *Phillips v. Overton*, 4 Hey. 291; Eq. Draft. 563.

⁴ *Hopkins v. Medley*, 97 Ill. 402.

⁵ *Fellows v. Fellows*, 4 Cowen. 682; *Bailey v. Wright*, 2 Bond, 181.

⁶ *Burnley v. Jeffersonville*, 3 McLean, 336; see also *Lewis v. Baird*, 3 McLean, 56; *Gray v. Regan*, 23 Miss. Cush. 304.

⁷ *Hawley v. Cramer*, 4 Cowen, 717; *Wood v. Mann*, 1 Sumner, 506.

⁸ *Taylor v. Luther*, 2 Sumner, 228; *Pettit v. Candler*, 3 Wend. 618.

⁹ *Buckingham v. Peddicord*, 2 Bland, 447.

¹⁰ *Bank v. Lynn*, 1 Pet. 376; *Brooks v. Byam*, 1 Story R. 226; *Church v. Jaques*, 1 Johns. Ch. R. 65.

by the interrogatories;¹ and where the defendant pleads the statute of limitations in answer to a bill in equity, he must answer all the charges in the bill which may avoid the bar, by showing a new promise; but he need not answer the original cause of action.² The defense of the statute of limitation may be raised by answer.³ The rule for determining whether an answer to any particular averment in a bill is necessary, is to ascertain whether it is material to the complainant to enable him to obtain the relief he seeks;⁴ a court will compel an answer to all the allegations of a bill that require proof.⁵

If the defendant desires to raise the objection to the bill, that the complainant has an adequate remedy at law, he should do so by demurrer, or at least it should be specially relied on in the answer. The objection can not be raised for the first time at the hearing.⁶

Exceptions to answer.—Chancery Rule 10 provides that all objections to an answer heretofore raised by exceptions shall be disposed of by the court on special motion.

Fraud, how alleged.—If a defendant wishes to rely upon a matter of fraud on the part of the complainant, the circumstances should be fully and specifically stated;⁷ as no presumption is to be indulged in favor of an answer, any more than in other pleading.⁸

Mode of answering.—An answer is the most usual method of defending a bill in chancery, and it may be put in either to the whole bill, or to such parts of it as are not covered by demurrer or plea. It is capable of embracing more circumstances than a plea, and for this reason may be used with much greater propriety in cases where the defendant is not anxious to prevent a discovery, although the plea might be a complete bar. But where, by introducing additional circumstances, he has a good opportunity of showing his case in a more favorable light, the answer is the best mode of defense.⁹

¹ *McDonald v. McDonald*, 16 Vt. 630.

² *Chapin v. Coleman*, 11 Pick. 331.

³ *Highstone v. Franks*, 95 Mich. 52.

⁴ *Batterson v. Ferguson*, 1 Barb. 490.

⁵ *Stacy v. Randall*, 17 Ill. 467.

⁶ *Tarbell v. Bowman*, 103 Mass. 341; *Creely v. Brick Co.*, 103 Mass. 514.

⁷ *Fitzpatrick v. Beatty*, 1 Gilm. 454; *Bank v. Levy*, 1 Edw. Ch. 316.

⁸ *Mahar v. O'Hara*, 4 Gilm. 424.

⁹ 1 Barb. Ch. Pr. 130.

An answer has a double purpose; *first*, that of answering the complainant's case as made by the bill; and *second*, that of stating to the court the nature of the defense upon which the defendant means to rely; and in this respect it fulfills the duty of a plea, or a series of pleas, either denying facts upon which the complainant's equity, as stated in the bill, arises, or by confessing such facts, and avoiding them by the introduction of some new matter, from which contrary inferences may be drawn. The conclusions of law from the facts stated should not be stated. The facts intended to be relied on should be clearly and succinctly alleged; and the inference of law from them should be left to the court after argument. The defendant may set up any number of defenses in his answer, as a consequence of the same state of facts, which his case will allow, or ingenious counsel can suggest, but the defenses must be consistent with each other.¹ If they are inconsistent, or alternative, they are bad,² and the result will be to deprive him of the benefit of either, and to entitle the complainant to a decree.²

The defendant may, in his answer, rely on any matter which shows that the complainant is not entitled to the relief he claims by his bill. If he succeeds in establishing such a defense, there will be a denial of the relief sought and a dismissal of the bill. The answer, however, can be used only for the purpose of defense. It can not be used for relief.

Affirmative relief on answer.—See Answers in nature of Cross-bills *post*.

Frame of an answer.—An answer always begins with its title, specifying of which of the defendants it is the answer, and the names of the complainants in the suit in which it is filed as an answer.⁴ It is irregular, and may be rejected, if it is not properly entitled, and does not show what bill it purports to answer.⁵

The answer is entitled, "The answer of C D, defendant, to

¹ *Stone v. Moore*, 26 Ill. 165; *Craig v. People, etc.*, 47 Ill. 487; 2 Anst. 397, 386; McCle. 317; 2 Dan. Ch. Pr. 814-816.

² *Jesus College v. Gibbs*, 1 Younge & Coll. 145; 6 Price, 504.

³ 2 Dan. Ch. Pr. 243.

⁴ Coop. Eq. Pl. 323; Story's Eq. Pl. § 869.

⁵ *Supervisors v. R. R. Co.*, 21 Ill. 365; *Peiters v. Thompson*, Coop. 249; *Griffiths v. Wood*, 11 Ves. 62.

the bill of complaint of A B, the complainant.”¹ After the title of the answer, it proceeds to reserve to the defendant all advantages which might be taken by exception to the bill; a form which is intended to prevent a conclusion that the defendant, having submitted to answer the bill, admits everything, which by his answer he does not expressly controvert, and especially such matters as he might have objected to by demurrer or by plea.² It will not, however, in general, have that effect.³ The substance of the answer then follows, in which the matters of the bill, with the interrogatories founded thereon, are answered, one after the other, together with such additional matter as the defendant thinks necessary to bring forward his defense, either for the purpose of qualifying, or of adding to, the case made by the bill, or of stating a new case on his own behalf.⁴ This is followed by a general denial of all the unlawful combinations charged in the bill, and of all other matters therein contained, and not specially traversed or admitted.

To so much of the bill as is material and necessary for the defendant to answer, he must reply directly, without evasion, and not by way of negative pregnant. He must not answer the charge merely literally, but he must confess or traverse the substance of each charge positively and with certainty. Particular and precise charges must be answered particularly and positively, and not in a general manner, even though the general answer may amount to a full denial of the charge.⁵ But if any of the particular inquiries in the bill are as to matters which are totally immaterial to the case, the defendant need not answer them.⁶

If the charge in the bill embraces several particulars, the answer should be in the disjunctive, denying each particular; or admitting some and denying the others, according to fact.⁷

¹ 2 Dan. Ch. Pr. 266; Story's Eq. Pl. § 870.

² Coop. Eq. Pl. 323; Story's Eq. Pl. § 870, 872; Mitf. Eq. Pl. 313, 614; *Griffiths v. Wood*, 11 Ves. 62.

³ *Id.*; Story's Eq. Pl. §§ 694, 870; Beame's Pl. in Eq. 46, 47.

⁴ Coop. Eq. Pl. 323-325; Mitf. Eq. Pl. 313-315; Story's Eq. Pl. § 870.

⁵ *Jones v. Wing*, Har. Ch. 301;

Woods v. Morrell, 1 Johns. Ch. R. 103; *Stacy v. Randall*, 17 Ill. 467; *Parkinson v. Truesdale*, 3 Scam. 369; *Taylor v. Luther*, 2 Sumner, 28; 6 Ves. 792; 3 Litt. 80; 1 Sim. & Stu. 235.

⁶ 1 Barb. Ch. Pr. 136; *Daniel v. Bishop*, 13 Price, 15.

⁷ *Davis v. Mapes*, 2 Paige Ch. R. 105.

It may be observed, that the general rule that nothing is to be presumed in favor of a pleading, is applicable to an answer in chancery.¹

Must be paragraphed.—Chancery Rule 10 provides that an answer shall be *divided into paragraphs*, numbered consecutively, and each paragraph shall contain as near as may be a separate and distinct allegation, admission or denial. An answer not complying with this rule shall be stricken from the files on motion, unless the court shall deem it proper to allow amendments thereto to cure the defect.

What answer should contain.—Chancery Rule 10 provides that every answer shall contain an explicit admission or denial of each allegation in the bill of complaint, as to which the defendant has knowledge or belief. But as to matters charged in the bill as to which the defendant avers he has no knowledge sufficient to form a belief, he shall not be required to admit or deny the same; but shall state his want of such knowledge; and every material allegation in the bill to which the defendant shall not make answer shall be taken as admitted by the defendant.

Answers may be joined.—Two or more defendants may join in the same answer, and where their interests are the same, and they appear by the same solicitor, they ought to do so, unless some good reason exists for their answering separately;² for otherwise the non-joiner may affect them in the matter of the costs at the final hearing.³ It may, therefore, be stated as a general rule, that the defendants should answer jointly, unless their interests are different.⁴

The answer of joint defendants need not be joint and several.⁵

One defendant may answer by adopting the answer of his co-defendant;⁶ and in a bill against husband and wife a joint answer should be put in, but if the wife refuses to join, the husband may answer separately.⁷

Signing of answer.—Chancery Rule 10 provides that an

¹ *Mahar v. O'Hara*, 4 Gilm. 424.

² *Van Sandon v. Moore*, 1 Russ. 441;

2 Dan. Ch. Pr., Ch. 15, § 2, pp. 265, 266; Story's Eq. Pl. § 869.

³ 2 Dan. Ch. Pr. 265, 266.

⁴ Story's Eq. Pl. § 869; Mitf. Ch. Pl. 313, 314; *Griffiths v. Wood*, 11 Ves. 62.

⁵ *Davis v. Davidson*, 4 McLean, 136; *Masterson v. Craig*, 5 Litt. 39.

⁶ *Binney's Case*, 2 Bland, 99.

⁷ 1 Paige Ch. R. 421; *Robins v. Abraham*, 1 Halst. Ch. (N. J.) 16; *Id.* 61.

answer shall be signed by the defendant, or by his agent or solicitor.¹

Swearing to answer.—The statute of Michigan requires every answer to be verified by an oath or affirmation, except where the complainant waives the oath. Where the bill is for discovery only, the oath or affirmation can not be waived.²

Chancery Rule 10 provides that whenever in a cause a sworn bill of complaint is filed, and a sworn answer demanded, the defendant shall be required to file such sworn answer.

Before whom may be sworn to.—Chancery Rules 2 and 10 provide that the plea or answer of the defendant may be sworn to before any officer authorized by the laws of this state to administer oaths or take affidavits. It may also be sworn to before any notary public or other person authorized by the laws of any other state or territory to administer oaths; but if sworn to in any other state or territory there shall be added the certificate of the clerk of some court of record of the county under the seal thereof, showing the official character of the person administering the oath, and the genuineness of his signature. Such plea or answer may be sworn to in any foreign country, before any minister or other diplomatic agent or consul of the United States, or any notary public; but the certificate of such notary shall be made under his notarial seal.

Where the oath is waived in the bill, it would be regarded as an improper practice for a solicitor to put in an answer under oath.³

An answer filed without being sworn to, may be treated as a valid answer by the complainant, and in that case will have the same effect in favor of the defendant as if sworn to.⁴ If the affidavit is insufficient, objection must be taken before the final hearing,⁵ otherwise it is a waiver of the objection.⁶

¹ *Berner v. Berner*, 72 Mich. 43; *Balen v. Mercier*, 75 Mich. 44.

² How. Stat. § 7521.

³ *Willenborg v. Murphy*, 36 Ill. 344; *Wallwork v. Derby*, 40 Ill. 527; *Moore v. Hunter*, 1 Gilm. 317; *Hopkins v. Granger*, 52 Ill. 504.

⁴ *Fulton Bank v. Beach*, 3 Paige Ch. R. 307; *Contee v. Dawson*, 2

Bland, 264; *Moore v. Hunter*, 1 Gilm. 317; *Reed v. Warner*, 5 Paige Ch. R. 650; *Denison v. Bassford*, 7 Paige Ch. R. 370; *Stevenson v. Mathers*, 67 Ill. 123; *Adlard v. Adlard*, 65 Ill. 212.

⁵ *Bate v. McLaughlin*, 1 A. K. Marsh. 207.

⁶ *Geizer v. Burk*, 3 S. & M. 439.

Waiver of oath.—The statute of Michigan provides that when a bill shall be filed in a court of chancery, other than for discovery only, the complainant may waive the necessity of the answer being made on the oath of the defendant; and in such cases, the answer may be made without oath, and shall have no other or greater force as evidence than the bill.¹ If the complainant waives an answer under oath, under this section of the statute, he must waive it to the whole bill. And after the defendant has answered the original bill on oath, the complainant can not avoid the effect of such answer by filing an amended bill waiving the oath. The answer under oath to the original bill would still be evidence on the hearing of the cause, so far as responsive to the bill.²

Where an answer is not under oath, it is a mere pleading, serving only to make up an issue;³ and swearing to an answer, when the oath is waived, will give it no greater effect on the hearing than when not sworn to;⁴ but the complainant may avail himself of any admission and allegation therein to make out his case.⁵

Failure to admit facts set up in the bill is, in an answer, equivalent to a denial, and leaves the burden of proof on complainant; while if the answer by implication admits allegations of the bill, it relieves complainant from the burden of proof.⁶

Effect of sworn answer as evidence.—Chancery Rule 10 provides that neither a sworn bill, nor a sworn answer, shall have the force of evidence, except as to admissions, and except on the hearing of motions and petitions; provided, however, that when a cause is heard on bill and answer, the allegations of the answer shall be taken as true.⁷

¹ How. St. § 6621.

² *Wyller v. Crane*, 53 Ill. 490; *Jefferson v. Kennard*, 77 Ill. 246; *Knisely v. Sampson*, 100 Ill. 573.

³ *Morris v. Hoyt*, 11 Mich. 9; *Chambers v. Rowe*, 36 Ill. 171; *Willenborg v. Murphy*, Id. 344; *Wallwork v. Derby*, 40 Ill. 527; *Hopkins v. Granger*, 52 Ill. 504; *Willis v. Henderson*, 4 Scam. 13.

⁴ *Moore v. Hunter*, 1 Gilm. 317; *Andrews v. Knox Co.*, 70 Ill. 65; *Van Inwagen v. Van Inwagen*, 86

Mich. 3; *Newlove v. Callaghan*, 86 Mich. 301.

⁵ *Durfee v. McChurg*, 6 Mich. 223; *Smith v. Clark*, 4 Paige Ch. R. 368; *Union Bank v. Geary*, 5 Pet. 99, 110-112; 1 Clark's Ch. R. 63; *Story's Eq. Pl. § 875*, and cases cited.

⁶ *Hardwick v. Bassett*, 25 Mich. 149; *Shook v. Proctor*, 27 Mich. 349.

⁷ *Huyck v. Bailey*, 100 Mich. 223; *Fields v. Com.*, 102 Mich. 449; *Ruhleg v. Wiegart*, 49 Mich. 399.

When answer is evidence against a co-defendant.—The answer of one defendant can not be read in evidence against another, except in particular cases, as where such defendants are partners, or where one has acted as the agent of the other in any transaction to which the answer may relate, and the agency or partnership, at the time of filing the answer, still exists.¹

An answer called for on oath, so far as responsive, is evidence for, as well as against, defendant.² Such an answer is treated as evidence, like unto a deposition.³ But new matter brought in by the answer is not evidence for the defendant.⁴

Answer of deceased ancestor as evidence.—The answer of a deceased ancestor may be read in evidence against the heirs or devisees, where they claim under him in an action brought for the same subject-matter.⁵

Admissions in answer.—Where a fact is alleged in the bill, and admitted by the answer, the admission is conclusive, and evidence tending to dispute it will not be considered.⁶ Nothing will be regarded as admitted by the answer unless expressly admitted, for failure to admit facts set up in a bill is equivalent to a denial. But, if the answer by implication admits the allegations of the bill, it relieves the complainant from the burden of proof.⁷ If an admission has been made in an answer improvidently and by mistake, the court will relieve the party making it from its effect, by an order directing so much of the answer as contains the admission to be treated as no part of the record, but, before such an order will be made, the court must be satisfied by affidavit that the admission was made under a misapprehension or by mistake. Courts exercise a liberal discretion in relieving from the effect of admissions in answers not under oath, which are mere pleadings, and are frequently signed by counsel; but where an answer is under oath, great caution is observed. If the relief sought is from

¹ *Emerson v. Atwater*, 12 Mich. 314;
Rust v. Mansfield, 25 Ill. 338; *Pensonau v. Pulliam*, 47 Ill. 58.

² Walker's Ch. 267; *Robinson v. Cromelien*, 15 Mich. 316.

³ *Roberts v. Miles*, 12 Mich. 297;
Hart v. Carpenter, 36 Mich. 402;
Van Dyke v. Davis, 2 Mich. 144.

⁴ *Hunt v. Thorn*, 2 Mich. 213.

⁵ *Rust v. Mansfield*, 25 Ill. 338; see also 42 Mich. 447.

⁶ *Weider v. Clark*, 27 Ill. 251.

⁷ *Morris v. Morris*, 5 Mich. 171;
Young v. McKee, 13 Mich. 552;
Hardwick v. Bassett, 25 Mich. 149;
Shook v. Proctor, 27 Mich. 349.

an admission of law, it may be sufficient to show that he was erroneously advised by his solicitor in that regard; but where the relief sought is from an admission of fact, it should be shown that the answer was drawn with care and attention, stating upon information and belief such facts as were not within the defendant's own knowledge. No court ought to relieve a party from the consequences of a reckless misstatement under oath. It should also be shown that the fact misstated was not one within the defendant's own knowledge, and that he was erroneously informed in regard to it, and made oath to the answer, honestly believing such erroneous information.¹

Where a defendant has by a mistake or misapprehension of the facts, or of his rights, made an admission in his answer inconsistent with the truth, he may file a supplemental answer under which he may prove that the fact was contrary to the admission.²

Answer of a corporation.—The answer of a corporation aggregate is not required to be sworn to, but is attested by the corporate seal. If a discovery is sought, individual corporators may be sworn, but they must be named as defendants in the bill.³

Answer of infants and insane defendants.—**GUARDIAN AD LITEM.**—The statute of Michigan provides that after the issuing and service of process against any infant defendant, the suit shall not be further prosecuted until a guardian for such infant shall have been appointed. So, too, a guardian may be appointed by the court to protect the rights of an insane defendant.⁴

A guardian *ad litem* should make himself familiar with the condition of the case, and the rights and interests of the infant

¹ *Maher v. Bull*, 39 Ill. 531; *Snyder v. Truesdale*, 6 McLean, 459; *Coquillard v. Snyder*, 8 Blackf. 24.

² *Hardwick v. Bassett*, 25 Mich. 149; *Hardwick v. Bassett*, 29 Mich. 17; *Hughes v. Bloomer*, 9 Paige Ch. R. 269; *Bowan v. Gross*, 4 Johns. Ch. R. 375; *Murdock's Case*, 2 Bland, 461; *McKim v. Thompson*, 1 Bland, 150; *Cary v. Ector*, 7 Geo. 99.

³ *Beecher v. Anderson*, 45 Mich. 543, and cases there cited; *Vermilyea v. Fulton Bank*, 1 Paige Ch. R. 37; *Angell & Ames on Corp.* 595; *Supervisors, etc., v. M. & W. R. R. Co.*, 21 Ill. 365; 1 Johns. Ch. R. 366.

⁴ How. Stat. § 8130-4; see *Foreman v. Stickney*, 77 Ill. 575; *Lloyd v. Malone*, 23 Ill. 43.

defendants; and if the circumstances and the infant's interests require it, he should make a vigorous defense.¹ Nothing can be admitted by the infant, nor his guardian *ad litem* for him; but every allegation in the bill must be strictly proved, so far as the infant is concerned;² and the record of the proceedings must furnish proof to sustain a decree against infant defendants, whether the guardian *ad litem* answer or not, or whether he admits or denies the allegation.³

Unless a guardian *ad litem* is appointed for infant defendants, all proceedings against them will be erroneous.⁴ But if they are not in court for want of service,⁵ or notice by publication,⁶ the appointment of a guardian *ad litem* would be void.

A bill can not be taken as confessed against a defendant who is an infant or insane, under any circumstances.⁷

It is the duty of a guardian *ad litem* of infant defendants to submit to the court, for its consideration and decision, every question involving the rights of his ward. But the court will protect such rights where they are manifestly entitled to something, although their guardian *ad litem* neglects to claim it in their behalf.⁸

¹ *McClay v. Norris*, 4 Gilm. 370; *Sconce v. Whitney*, 12 Ill. 150; *Cost v. Rose*, 17 Ill. 278; *Rhoads v. Rhoads*, 43 Ill. 239; *Peak v. Pricer*, 21 Ill. 164.

² *Thayer v. Lane*, Walk. Ch. 200; *Chandler v. McKinney*, 6 Mich. 219; *Cooper v. Mayhew*, 40 Mich. 528; *Sheahan v. Judge Wayne Circuit*, 42 Mich. 69; *Hitt v. Ormsbee*, 12 Ill. 166; *Tuttle v. Garrett*, 16 Ill. 354; *Lloyd v. Malone*, 23 Ill. 43; *Reddick v. State Bank*, 27 Ill. 148; *Masterson v. Winswold*, 18 Ill. 48; *Carr v. Fielden*, *Id.* 77; *Tibbs v. Allen*, 27 Ill. 129; *Hees v. Vose*, 52 Ill. 474; *Fischer v. Fischer*, 54 Ill. 231.

³ *Masterson v. Winswold*, 18 Ill.

48; *Carr v. Fielden*, *Id.* 77; *Chaffin v. Heirs of Kimball*, 23 Ill. 36; *Goudy v. Hall*, 36 Ill. 313; *Tibbs v. Allen*, 27 Ill. 129.

⁴ *Hall v. Davis*, 44 Ill. 494; *Quigley v. Roberts*, *Id.* 503; *Sullivan v. Sullivan*, 42 Ill. 315; *McDaniel v. Correll*, 19 Ill. 226; *Peck v. Shasted*, 21 Ill. 137.

⁵ *Clark v. Thompson*, 47 Ill. 25.

⁶ *McDermaid v. Russell*, 41 Ill. 490; *Hickenbotham v. Blackledge*, 54 Ill. 318.

⁷ *McClay v. Norris*, 4 Gilm. 370; *Sconce v. Whitney*, 12 Ill. 150; *Cost v. Rose*, 17 Ill. 278.

⁸ *Stark v. Brown*, 101 Ill. 395.

FORMS OF ANSWER.

Miscellaneous forms of commencements and conclusions of answers.

I. THE TITLES.

No. 49. Title of answer by one defendant.

The answer of C D, the defendant, to the bill of complaint of A B, the complainant.

No. 50. Title of a joint and several answer.

The joint and several answer of C D and E F, the defendants, to the bill of complaint of A B, the complainant.

No. 51. Title of the answer of one of several defendants.

The answer of C D, one of the defendants, to the bill of complaint of A B, the complainant.

No. 52. Title of answer to amended bill.

The answer of C D, the defendant, to the amended bill of complaint of A B, the complainant.

No. 53. Title of answer where exceptions have been taken to a form of answer, and the bill has also been amended.

The further answer of C D, one of the defendants, to the original bill, and his answer to the amended bill of complaint of A B, the complainant.

No. 54. Title of answer to a supplemental bill.

The answer of C D, the defendant, to the supplemental bill of complaint of A B, the complainant.

No. 55. Title of amended answer.

The amended answer of C D, the defendant, to the bill of complaint of A B, the complainant.

No. 56. Title of answer by infants by their guardian ad litem.

The answer of C D, an infant under the age of twenty-one years, by E F, his guardian *ad litem*, to the bill of complaint of A B, the complainant.

II. THE COMMENCEMENT.

No. 57. Introduction to an answer of one defendant.

This defendant, now and at all times hereafter, saving to himself all manner of benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the said bill contained, for answer thereunto, or to so much and such parts thereof as this defendant is advised it is or are material or necessary for him to make answer unto, answering, says, etc.

Or thus:

This defendant, reserving to himself all right of exception to the said bill of complaint, for answer thereto, says, etc.

No. 58. Introduction to answer of several defendants.

These defendants, now and at all times hereafter saving and reserving to themselves, and each of them, all benefit and advantage of exception or otherwise, that can or may be had or taken to the many errors, uncertainties and other imperfections in the said bill contained, for answer thereto, or to so much thereof as these defendants are advised is or are material or necessary for them, or any of them, to make answer unto, they, these defendants, severally answering, say, etc.

Or thus:

These defendants, reserving to themselves all right of exception to the said bill of complaint, for answer thereto, say, etc.

III. COMMON FORMS IN FRAMING ANSWERS.

No. 59. Where defendant admits a statement.

And this defendant further answering, says that he has been informed and believes it to be true, that, etc.

Or,

This defendant admits that, etc.

No. 60. Where a defendant admits a statement of a written instrument.

And this defendant further says, that he has been informed, and believes it to be true, that, etc.; but for greater certainty therein, craves leave to refer to the said, etc., when the same shall be produced.

No. 61. Where a defendant believes a statement may be true, but qualifies his admission of it, not knowing the same of his own knowledge.

And this defendant further says, he has never heard or been informed, save by the complainant's said bill, whether, etc.; but this defendant believes that, etc., as in the said bill is alleged.

No. 62. Where a defendant is entirely ignorant with regard to the statement in the bill.

And this defendant, further answering, says, it may be true, for anything this defendant knows to the contrary, that, etc.; but this defendant is an utter stranger to all and every such matters, and can not form any belief concerning the same.

No. 63. Where one of two defendants, of his own knowledge, knows the statement in the bill to be true, and the other defendant does not know the same, but believes the answer of his co-defendant.

And this defendant, C D, further severally answering, says, and this defendant, E F, believes it to be true, that, etc.

No. 64. *Where one of two defendants denies the allegation in the bill, and the other defendant believes such denial to be true.*

And this defendant, C D, further severally answering, says, he denies, and this defendant, E F, believes such denial to be true, that, etc.

No. 65. *Where several defendants join, and are all ignorant of the allegations in the bill.*

And these defendants further severally say that they, or any or either of them, to the knowledge or belief of the others or other of them, do not know, and have never been informed, save by the complainant's bill, and can not set forth as to their belief or otherwise, whether, etc.

No. 66. *General frame of an answer.*

STATE OF MICHIGAN.

The Circuit Court for the County of ———. In Chancery.

A B,	}
Complainant,	
vs.	
C D,	
Defendant.	

The answer of C D, defendant to the bill of complaint of A B, complainant.

This defendant, now and all times hereafter saving and reserving unto himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the said bill contained, for answer thereunto, or to so much and such parts thereof as this defendant is advised it is or are material or necessary for him to make answer unto,* answering, says, etc.

1. This defendant admits, etc.

2. This defendant, further answering, denies, etc., (*and so on through the whole bill, admit or deny every material allegation, and set up any matter in defense or avoidance, as the nature of the case may require, dividing the answer into paragraphs, numbered consecutively, each paragraph containing as near as may be a distinct and separate allegation, admission, or denial,¹ and then conclude as follows:*)

And this defendant denies all and all manner of unlawful combination and confederacy, wherewith he is by the said bill charged, without this, that there is any other matter, cause or thing in the complainant's said bill of complaint contained, material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain and prove, as this honorable court shall direct; and prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

C D.

_____,
Solicitor for Defendant.

¹ See Chan. Rule 10.

If the answer is required to be under oath, the following affidavit should be attached:

No. 67. Affidavit to answer.

STATE OF MICHIGAN, }
County of _____ } ss.

On this _____ day of _____, 18—, before me personally appeared C D, and made oath that he has read (or heard read), the above answer, subscribed by him, and knows the contents thereof, and that the same is true, of his own knowledge, except as to matters which are therein stated to be on his information and belief, and as to those matters, he believes them to be true.

E F, Notary Public,
_____ County, Michigan.

No. 68. Short form of answer.

STATE OF MICHIGAN.

The Circuit Court for the County of _____. In Chancery.

A B, }
Complainant, }
vs. }
C D, }
Defendant. }

The answer of C D, defendant, to the bill of complaint of A B, complainant.

This defendant, reserving to himself all right of exception to the said bill of complaint, for answer thereto, says, etc. (*Proceed with the several averments according to the case, admitting or denying every material allegation in the stating part of the bill, and set up any matter in defense or avoidance, as the nature of the case may require, dividing the answer into paragraphs numbered consecutively, each paragraph containing as near as may be a separate and distinct allegation, admission or denial, and conclude as follows:*)

And this defendant further answering, denies that complainant is entitled to the relief, or any part thereof, in the said bill of complaint demanded, and prays the same advantage of this answer as if he had pleaded or demurred to the said bill of complaint; and prays to be dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained.

Sol. for defendant.

C D.

(*Add affidavit, if required, as in last form.*)

No. 69. Answer of infants, by their guardian ad litem.

(*Title as in No. 65, ante.*)

The answer of E D and C D, infants, under the age of _____ years, by E F, their guardian *ad litem*, to the bill of complaint of A B, the complainant.

These defendants, answering by their guardian *ad litem*, say that they are

infants; this defendant E D, of the age of —— years, or thereabouts, and this defendant C D, of the age of —— years, or thereabouts, and they therefore submit their rights and interests in the matter in question in this cause, to the tender consideration and protection of this honorable court, and pray strict proof of the matters alleged in said bill of complaint.

E D,
C D.

By E F, their guardian *ad litem*.

No. 70. Statement in answer, claiming the benefit of the statute of frauds.

And this defendant says, that by the statute of ——, it is among other things provided, that no action shall be brought whereby to charge any person upon any contract of any lands, tenements and hereditaments, or any interest in or concerning them, unless the agreement upon which such action should be brought, or some memorandum or note in writing shall be signed by the said party to be charged therewith, or some other person by him lawfully authorized (*give the language of the statute.*) And this defendant insists upon the said statute, and claims the same benefit as if he had pleaded the same.

No. 71. Conclusion of an answer, insisting that the complainant has an adequate remedy at law.

And this defendant submits to this honorable court that all and every the matters in the complainant's bill mentioned and complained of, are matters which may be tried and determined at law, and with respect to which the complainant is not entitled to any relief from a court of equity; and this defendant asks that he shall have the same benefit of this defense as if he had demurred to the complainant's bill; and this defendant denies, etc.

When to be filed.—In Michigan, upon the return of the chancery *subpœna* served, the defendant must cause his appearance to be entered within fifteen days after the service of the writ, demanding a copy of the bill. If he does not require a copy of the bill he must plead, answer or demur within the same time, or he may be defaulted. If a copy is required he must answer within fifteen days from the service of the copy, or the bill will be taken as confessed.¹ The court, or a circuit court commissioner, upon a proper showing, has power to grant an order *ex parte* enlarging the time for a defendant to answer.

Dismissal of bill.—If a copy of the bill is not delivered in fifteen days, or further time allowed for so doing, defendant,

¹ Chancery Rule 5.

on filing affidavit of service of notice of the order, may have a decree dismissing the suit with costs.¹

But a defendant who has answered and moved to dissolve an injunction, thereby waives default in service of copy of the bill.²

Amendment of answer.—Chancery Rule 16 provides that after an answer is put in it may be amended without leave of court in any matter of form, or by filling up a blank, or correcting a date, or reference to a document, and may be re-sworn at any time before a replication is put in, or the cause is set down for a hearing on the bill and answer. But after replication, or such setting down for a hearing, it shall not be amended in any material matters, as by adding new facts or defenses, or qualifying or altering the original statements, except by leave of the court, upon cause shown, after due notice to the adverse party.

Permission to a defendant to amend his answer is a matter in the discretion of the court, and will generally be allowed in the promotion of justice, and when injury can not result to the complainant, and in cases where injury might result unless time is given to the opposite party to meet the change in the case produced by the amendment, the court will refuse leave to amend, or give the other party a reasonable time to meet the amendment. But the amendment should be confined to clear mistake of matter of fact. The ground of defense should not be changed.³ Generally, amendments will be allowed in chancery pleadings at the discretion of the court.⁴ When it is made on a material point, the motion should be based upon an affidavit of the facts which make it necessary.⁵ An amendment may be granted before replication, where new matter has come to the knowledge of the defendant since the answer was put in;⁶ or in cases of surprise, as where an addition has been made to the draft of the answer, after the

¹Chancery Rule 7.

²*Higgins v. Carpenter*, Har. Ch. 256.

³*Graves v. Niles*, Har. Ch. 332; *Emerson v. Atwater*, 12 Mich. 314; *Wylder v. Crane*, 53 Ill. 490; *Haskell v. Brown*, 65 Ill. 29; *Roberts v. Stigleman*, 78 Ill. 120.

⁴*Artee v. Engart*, 13 Ill. 243; *Liggon v. Smith*, 4 Hen. & Munf. 477.

⁵*Liggon v. Smith*, 4 Hen. & Munf. 447; Barb. Ch. Pr. 164.

⁶*Patterson v. Slaughter*, Amb. 292; *Wells v. Wood*, 10 Ves. R. 402; *Alpha v. Payman*, Dick. 33.

defendant has perused it.¹ It will be allowed where a defense is defectively set forth, in order to give the party a benefit of the defense which he intended to present. But he will not be permitted to put in a new or additional plea or answer.²

Verification of an answer in the nature of a cross-bill for divorce may be supplied by amendment before decree.³

Answer to amended bill.—In answering an amended bill, the defendant, if he has answered the original bill, should answer only those matters which have been introduced by the amendments.⁴ In fact, the answer to an amended bill constitutes, together with the answer to the original bill, but one record, as much as if it had been engrossed on the same paper; * in the same manner that an original and an amended bill are considered as the same record. Upon this principle it is that it has been held that it is impertinent to repeat, in the answer to the amended bill, what appears upon the answer to the original bill, unless by the repetition the defense is materially varied. In our state it has been held that where leave is given to amend an answer, a new answer,⁵ with the amendments added, must be filed and served, or the original answer withdrawn by leave of the court, and the amendments added; or the amendments must refer to the portions of the answer on file intended to be amended, and specify their nature and application.⁶ Where the amendments are not noted upon the amended bill, the defendant should ascertain where the amendments are and answer them only.⁷

SECTION V.

DISCLAIMER.

Nature of.—A disclaimer is a renunciation by the defendant of all interest or claim to the subject of demand made by the

¹ *Chute v. Lady Dacre*, 1 Eq. Ca. Ab. 29; 1 Barb. Ch. Pr. 164.

² *Beach v. Fulton Bank*, 3 Wend. 573; *Graves v. Niles*, Har. Ch. 232.

³ *Harrison v. Harrison*, 94 Mich. 559.

⁴ *Hinde's Ch. Pr.* 22; 1 Barb. Ch. Pr. 159.

⁵ *Mitf. Eq. PL* 257; *Hildyard v.*

Cressy, 3 Atk. 303; *Bennington Iron Co. v. Campbell*, 2 Paige Ch. R. 159.

⁶ *Smith v. Searle*, 14 Ves. 415; *Mason v. Detroit City Bank*, Har. Ch. 222; Chancery Rule 17.

⁷ *Bennington Iron Co. v. Campbell*, 2 Paige Ch. R. 159; 1 Barb. Ch. 159.

complainant in his bill. It can not be used, however, for the purpose of depriving the complainant of his right to a full answer, where it is evident that, notwithstanding the disclaimer, the defendant ought to be retained as a party to the suit. A mere witness may avoid answering by a disclaimer; but it is otherwise with an agent charged by the bill with a personal fraud, for the law does not permit a man to disclaim a liability.¹

A disclaimer is distinct in substance from an answer, although sometimes confounded with it.² But it can seldom be put in without an answer; for if a defendant has been made a party by mistake, having had an interest, which he may have parted with, the plaintiff may require an answer sufficient to ascertain whether that is a fact or not; and if, in truth, it is so, an answer seems necessary to enable the complainant to make the proper party, instead of the defendant disclaiming.³

A mere disclaimer is scarcely to be deemed sufficient or proper, except where the bill simply alleges that the defendant claims an interest in the property in dispute, without more; for under such circumstances, if he has no interest, that is a sufficient answer to the allegation;⁴ and he need not answer further.⁵

As a defendant may disclaim and answer, so he may demur to one part of the bill, plead to another, answer to a third, and disclaim to a fourth; but all these defenses must clearly refer to separate and distinct parts of the bill.⁶

A defendant can not, by a disclaimer, deprive the complainant of the requiring a full answer from him, unless it is evi-

¹ Barton's Suit in Eq. 94; 2 Dan. Ch. Pr. 233; Mitf. Eq. Pl. 153; *Ellsworth v. Curtis*, 10 Paige Ch. R. 105; *Bentley v. Cowman*, 6 Gill & J. 152; Story's Eq. Pl. § 838; *Glassington v. Thwaites*, 2 Russ. R. 458; *Whiting v. Rush*, 2 Younge & Coll. 546, 552; *Bukeley v. Dunbar*, 1 Anst. R. 37; Welford's Eq. Pl. 254; See Rule 16.

² *Mounsay v. Burnham*, 1 Hare R. 15.

³ *Ellsworth v. Curtis*, 10 Paige Ch. R. 105; Story's Eq. Pl. § 838.

⁴ *Graham v. Coape*, 9 Sim. 102; S. C., 3 Mylne & Craig, 638.

⁵ *Spofford v. Manning*, 2 Edw. Ch. R. 358.

⁶ Coop. Eq. Pl. 309, 310; Mitf. Eq. Pl. 319, 320; Story's Eq. Pl. §§ 436, 437, 839.

dent that the defendant ought not, after such disclaimer, to be retained as a party to the suit.¹

If the defendant disclaims, and it appears that the bill was exhibited for vexation only, the court will dismiss the bill with costs against the complainant.² A disclaimer must be full and explicit in all respects, and be accompanied by an answer denying the facts deemed necessary to be denied; it can not be made by way of demurrer.³ If it is accompanied by an insufficient answer, the complainant should except to the answer.⁴

No. 72. Disclaimer.

(*Title of court and cause.*) The disclaimer of C D, one of the defendants, to the bill of complaint of A B, the complainant.

This defendant, saving and reserving to himself, now and at all times hereafter, all manner of advantage and benefit of exceptions and otherwise that can or may be had and taken to the many untruths, uncertainties and imperfections in the said complainant's bill of complaint contained, for answer thereunto, or unto so much, or such part thereof as is material for this defendant to make answer unto, he answers and says:

1. That he fully and absolutely disclaims all manner of right, title and interest whatsoever, in and to the legacy of — dollars in said bill of complaint mentioned, and all other the estate and effects of the said Thomas Atkins, deceased, in the said bill named, and in and to every part thereof;

2. This defendant denies all and all manner of unlawful combination and confederacy unjustly charged against him in and by the said bill of complaint, without this, that any other matter or thing in said bill contained, material or necessary for this defendant to make answer unto, and not herein well and sufficiently answered unto, confessed or avoided, traversed or denied, is true; all which matters and things this defendant is ready to aver, maintain and prove, as this honorable court shall direct, and humbly prays to be hence dismissed, with his reasonable costs and charges, in this behalf most wrongfully sustained.

(*Add Affidavit, No. 67, ante.*)

No. 73. Answer and disclaimer.

(*Commence as in No. 66, ante, to the *.*) Answering says:

1. That he, this defendant, on behalf of E F, one of the other defendants in the said bill named, did about — years ago, contract and agree with G H for the purchase of the lands and tenements, etc., now in question, and

¹ *Glassington v. Thwaites*, 2 Russ. R. 458-462; *Graham v. Coape*, 9, Sim. R. 102; S. C., 3 Mylne & Craig, 638; *Ellsworth v. Curtis*, 10 Paige Ch. R. 105.

Eq. Pl. § 842; *Comstock v. Comstock*, 24 Mich. 39.

² *Worthington v. Lee*, 2 Bland, 678.

⁴ *Ellsworth v. Curtis*, 10 Paige Ch. R. 105.

³ *Coop. Eq. Pl. 310, 311; Story's*

in possession of L M, in the said bill also named, and another defendant thereto, which said lands and tenements, etc., at that time were, and for above — years before had been in the possession of the said G H and J K, in the said bill also named, or one of them, and for the purchase whereof this defendant, on behalf of the said defendant E F, agreed to give, and accordingly did give and pay to the said G H, the sum of — dollars; and in consideration thereof the said G H, and N, his wife, by deed bearing date on, etc., duly conveyed the said lands and tenements, etc., to the said E F, who thereupon, and under and by virtue of such conveyance, as this defendant has heard and believes, entered on and became seized of the said lands and tenements, etc., and continued so seized thereof without any entry or claim made by the complainant, or any other person or persons, until —, in the year —, when the said E F, as this defendant has heard and believes, by good and sufficient conveyance in the law, and in consideration of the sum of — dollars, *bona fide* paid, sold and conveyed the said lands and tenements, etc., to the said defendant, L M, and his heirs, who thereupon entered thereon, and was and yet is seized and possessed of the same; and this defendant further answering says:

2. He does not know, nor can he set forth, as to his belief or otherwise, whether R S, in the said bill named, was ever seized of the said premises, or any part thereof; and this defendant further answering, says:

3. He has been advised and believes that the said G H, and N, his wife, had good right and title to sell and convey the said premises so purchased by this defendant, on behalf of the said E F, as aforesaid; and this defendant further answering, says:

4. He denies that he ever had any notice of any right or title, the complainant or any other person, save as aforesaid, had or might, or could claim, of, in or to the said lands and tenements, etc., or any part thereof; and this defendant says:

5. That he never had or claimed, or pretended to have, nor has he now, nor does he claim, or pretend to have, any right, title, or interest of, in or to the said premises, or any part thereof; and this defendant proclaims all right and title of, in and to the same, and every part thereof.

(Conclude as in No. 66, ante.)

SECTION VI.

ANSWERS IN THE NATURE OF CROSS-BILLS.

Affirmative relief on answer.—Chancery Rule 11 provides that in any case in equity where a defendant shall claim from the complainant any relief which, according to the established course and practice of courts of chancery, might be had by cross-bill, such defendant shall be at liberty by his answer to present the facts upon which his equity rests, and to claim by such answer the benefit of a cross-bill, and the court shall have power to give relief upon such answer to the same extent that it might have given it had a cross-bill been filed.

The rule is not intended to deprive a party of any of his substantial rights secured to him by resort to a cross-bill; but to preserve to him all the benefit to be derived from a cross-bill, by stating the substance thereof in the answer.¹

When must be sworn to.—If the cause be such that, if a cross-bill had been filed, the practice of the court would have required it to be sworn to, the answer claiming such rights shall be under oath, notwithstanding an oath thereto may be waived by the bill.

Defense.—The complainant shall, within fifteen days after service of such answer in the nature of a cross-bill, file and serve a demurrer, plea or answer to the matters therein contained upon which the defendant prays affirmative relief, which pleading and the practice thereon shall comply with the rules governing similar pleadings. But the defendant shall not be required to file a replication to any such plea or answer.²

In the absence of any answer from complainant, the answer in the nature of a cross-bill may be taken as confessed.³

Frame of.—This rule does not relieve the party from stating the facts with the same particularity and certainty in his answer as he would, under former practice, be obliged to if he had resorted to a cross-bill. He must still state a case for equitable relief touching the matter in question in the original bill.⁴

Said rule further provides that in such case the defendant of the bill, in accordance with the foregoing rule, before entering upon an allegation of additional matters upon which he shall claim affirmative relief, and his allegation of additional matters and his prayer for affirmative relief, shall comply with the rule governing the form of bill of complaint.⁵

No summons or *subpœna* is required to be issued on the answer in the nature of a cross-bill, but the complainant is required to answer or demur to the same without further process.⁶

¹ *Hackney v. Mack*, 60 Mich. 592.

Mich. 593; *Cooley v. Harris*, 92 Mich. 121.

² Chan. Rule 11; see *Hackney v. Mack*, 60 Mich. 592.

³ Chan. Rule 11.

⁴ *Coach v. Kent*, 97 Mich. 564.

⁵ *City v. Det. Ry. Co.*, 55 Fed. Rep.

⁶ *McGuire v. Circuit Judge*, 69 574.

No. 74. Answer to bill of foreclosure, praying affirmative relief.

(Title of court and cause.)

The answer of C D, defendant, to the bill of complaint of A B, complainant.

This defendant, reserving to himself all right of exceptions to the said bill of complaint, for answer thereto says :

1. He admits the execution and delivery to the complainant by this defendant of the certain promissory note in the said bill of complaint described, at the time and place and in the manner and form as in said bill of complaint is alleged and set forth.

2. He admits the execution and delivery by him to the complainant of the certain mortgage in the said bill of complaint described, and that the same was duly acknowledged and filed for record as in and by said bill alleged and set forth.

3. This defendant further answering denies that there is now due upon said note and mortgage the sum of ——— dollars, as in said bill alleged, or any other sum whatsoever, and denies that complainant is entitled to the relief in said bill of complaint demanded, or any part thereof; but on the contrary thereof this defendant expressly avers and charges that on, etc., a certain agreement in writing was made and entered into by and between the said complainant and this defendant, whereby this defendant was to convey in fee to the complainant a certain portion of said mortgaged premises, to wit: (*Here describe.*) And that the complainant was thereupon to discharge and surrender to this defendant the said promissory note and cancel the said mortgage of record, as in and by said agreement now in the possession of this defendant, ready to be produced and proved as this court may direct, reference being had thereto, will more fully appear; a copy of which said agreement is hereto attached and made a part hereof as Exhibit A.

4. That in pursuance of the terms of said agreement, this defendant, on, etc., made, executed and acknowledged a warranty deed, conveying to the said complainant, in fee, the premises last above described, a certified copy of which said warranty deed is hereto attached and made a part hereof as Exhibit B; and that on, etc., at, etc., tendered the same to the complainant, who then and there refused to receive or accept the same, and has ever since continued so to do.

5. Whereby this defendant expressly charges and avers that the said promissory note became satisfied and discharged, and that the same should be canceled and surrendered to this defendant, and that the said mortgage should be canceled and held for naught as a cloud upon the title of this defendant.

6. This defendant further answering, admits that no proceedings at law have been had to recover said debt, which is by said bill alleged to be due from this defendant to the complainant, and secured by said note and mortgage, or any part thereof.

In consideration whereof, this defendant asks the aid of this court in the premises and prays :

I. That the said A B, complainant, may be required to make full and

direct answer to the matters and things herein charged and set forth (*but not under oath, the answer under oath being hereby waived*).

II. That the said mortgage from this defendant, C D, to the complainant, A B, bearing date on, etc., may be declared void as against this defendant, as a cloud upon his title, and that the said promissory note and mortgage may be delivered up to be canceled.

III. And that this defendant may have such other and further relief in the premises as shall seem meet and proper.

• ————— Sol. for Deft.

C. D.

CHAPTER IX.

AMENDMENT TO BILLS.

A court will permit amendments to bills, pleas, answers and replications, on such terms as it may deem proper, so that neither party be surprised nor unreasonably delayed thereby.

Amendments without leave of court.—Chancery Rule 16 provides that the complainant may amend his bill if it is not required to be sworn to, at any time before a plea, answer or demurrer is put in, without leave of court, and without costs. He may also amend of course without answer, at any time within fifteen days after answer is filed, if by the amendment a new or further answer is not rendered necessary. He may also amend, without leave of court, a bill required to be sworn to, in like manner as bills not required to be sworn to, if the amendments are merely in addition to and not consistent with what is contained in the original bill, but such amendments shall be verified by oath. If the defendant demurs to the bill for want of parties, or for any other defect, which does not go to the equity of the whole bill, the complainant may amend of course without costs, at any time before the demurrer is noticed for argument, or within ten days after receiving a copy of the demurrer. If a plea or demurrer to the bill be overruled, the complainant may, within ten days thereafter, amend his bill without leave of court and without costs.

Chancery Rule 17 provides that no rule or order need be entered on the filing of amendments which are authorized without leave of court. In every case of amendment without leave of court, the party making it shall either file a new engrossment of the pleading, or an engrossed or printed copy of the amendment, containing proper references to the pages and lines in the original pleading on file, where such amendments are to be inserted or made. But no amendments shall be con-

sidered as made until the same is served upon the adverse party if he has appeared in the cause.

If, at the time the complainant amends his bill without leave of court, the answer has not been filed, or if a further answer is necessary, the defendant shall have the same time to answer after such amendment as he originally had.¹

A court of equity is liberal in permitting amendments of the pleadings, that complete justice may be done.² It looks to the real and substantial merits of the case; matters of form are never suffered to prejudice the rights of a party. Whenever the complainant discovers a defect in his bill, arising from want of parties, or other reasons, if the cause is not at issue, he may obtain leave, as of course, to amend his bill.³

Amendments of bills should introduce only such matters as occurred prior to the filing of the bill, and which were omitted by mistake or ignorance of such facts.⁴ Matters which have occurred subsequent to the filing of the bill ought not to be introduced by amendment;⁵ because as the amendments are held to constitute part of the same record as the original bill,⁶ which can only relate to facts as they existed at the time of the filing of the bill, the introduction of matters of a posterior date would render the record incongruous. Matters, therefore, occurring since the filing of the original bill should be introduced by supplemental bill, and not by amendment.⁷

Nor can a bill be amended by inserting therein facts known to the complainant at the time of filing the bill, unless some

¹ Chan. Rule 17.

² *Marble v. Bonhotel*, 35 Ill. 240; *Wise v. Twiss*, 54 Ill. 301; *Gregg v. Brower*, 67 Ill. 525; *Barm v. Bragg*, 70 Ill. 283.

³ *Drouillard v. Baxter*, 1 Scam. 191; *Heacock v. Durand*, 42 Ill. 230; *Buckley v. Corse*, Saxon (N. J.) 504; *Smith v. Babcock*, 3 Sumner, 410; *Garlick v. Strong*, 3 Paige Ch. R. 440; *Erickson v. Rafferty*, 79 Ill. 209; *Marsh v. Greene*, 79 Ill. 385.

⁴ *Hammond v. Place*, Har. Ch. 438; *Burke v. Smith*, 15 Ill. 158; *Walker v. Hallett*, 1 Ala. N. S. 379; *Milner*

v. Harewood, 17 Ves. 144, 148; *Story's Eq. Pl.* §§ 336, 337.

⁵ *Barton's Suit in Eq.* 120; *Story's Eq. Pl.* § 332-334; *Stafford v. Howlett*, 1 Paige Ch. R. 200; *Colclough v. Evans*, 4 Sim. 76; *Wright v. Howard*, 6 Mad. 106; *Copen v. Flesher*, 1 Bond, 440.

⁶ *Vere v. Glynn*, 2 Dick. 441; *Jupling v. Stuart*, 4 Ves. 619.

⁷ *Stafford v. Howlett*, 1 Paige Ch. R. 200; *Archbishop of York v. Stapleton*, 2 Atk. 136; 5 Pick. 276; *Burke v. Smith*, 15 Ill. 158.

excuse is given for the omission.¹ And amendments can only be granted when the bill is defective in parties or in the prayer for relief, or in the omission or mistake of facts and circumstances connected with the substance, but not forming the substance itself, nor repugnant thereto.²

The amendment of pleadings is generally a matter of discretion; but if a denial deprives a party of a meritorious defense to the entire action, he may have the ruling reviewed on error.³

When to be made.—The court is invested with the discretion to allow amendments to a bill at any stage of the case.⁴ They may be made at the hearing to correspond with the proof, without continuing the case, unless it essentially changes the case made by the bill.⁵

It not unfrequently happens that the evidence does not support the allegations of a bill precisely in the form in which they are made; and it subserves none of the purposes of justice to dismiss the bill on the ground of a variance between the pleadings and the proof, when a slight amendment will render the testimony admissible; nor does the fact that the

¹ *Whitmarsh v. Campbell*, 2 Paige Ch. 67.

² *Verplank v. The M. Ins. Co.*, 1 Edw. Ch. 46; *Lyon v. Talmadge*, 1 Johns. Ch. 184; *Rodgers v. Rodgers*, 1 Paige Ch. 424; *Strickland v. Strickland*, 12 Sim. 253; 1 Barb. Ch. Pr. 207; Story's Eq. Pl. §§ 332, 614.

³ *Pangborn v. Ins. Co.*, 67 Mich. 683; *Dodson v. McKilvey*, 93 Mich. 263.

⁴ *Livingston v. Hayes*, 43 Mich. 129; *Drouillard v. Baxter*, 1 Scam. 191; *Jefferson Co. v. Ferguson*, 13 Ill. 33; *McArtee v. Engart*, Id. 243; *Mason v. Bair*, 33 Ill. 195; *Jennings v. Springs*, 1 Bailey Ch. 181; 6 Ala. 562; *Allen v. Smith*, 1 Leigh R. 331; *Perkins v. Hayes*, Cooke, Tenn. 189; *Farwell v. Meyer*, 35 Ill. 51; *Marble v. Bonhotel*, 35 Ill. 240; *Craig v. The People*, 47 Ill. 487; *Booth v. Wiley*, 102 Ill. 84.

⁵ *Briggs v. Briggs*, 20 Mich. 34; *Gorham v. Wing*, 10 Mich. 486; *Good-*

enow v. Curtis, 18 Mich. 298; *Babcock v. Twist*, 19 Mich. 516; *Slater v. Breese*, 36 Mich. 77; *Bank v. Niles*, Walk. Ch. 398; 1 Doug. Mich. 504; *House v. Dexter*, 9 Mich. 246; *Palmer v. Rich*, 12 Mich. 414; *Taylor v. Moran*, 13 Mich. 367; *Livingstone v. Hayes*, 43 Mich. 129; *Martin v. Eversal*, 36 Ill. 222; *Bank v. Godfrey*, 23 Ill. 580; *Morgan v. Smith*, 11 Ill. 194; *Brown v. Welsh*, 18 Ill. 347; *De Wolf v. Pratt*, 42 Ill. 198; *Hewett v. Dement*, 57 Ill. 500; *Neale v. Neale*, 9 Wall. U. S. R. 9; *Hoyt v. Tuxbury*, 70 Ill. 331; *Murch v. Mayers*, 85 Ill. 187.

⁶ *Marble v. Bonhotel*, 35 Ill. 240; *Moshier v. Knox College*, 32 Ill. 163; *Wise v. Twiss*, 54 Ill. 302; *Hutchinson v. Reed*, 1 Hoff. Ch. 320; *Malin v. Malin*, 2 Johns. Ch. 238; 2 Paige Ch. R. 467; *Bailey v. Bennett*, 3 Younge & Coll. 459; *Wilber v. Collier*, 1 Clarke, 315.

bill is verified by affidavit necessarily deprive the complainant of the benefit of an amendment. It is, however, no doubt true, that he is estopped from so amending his bill as to contradict facts which he has sworn to as positively true, unless he can clearly show the court that the statement was made in mistake. But when it only enlarges and amplifies the statement, or states additional facts, there is no objection to allowing the amendment to be made.¹ A mere formal amendment of a bill may be made after the hearing, without opening the case to let in new proofs on the part of the defendant.² When an amendment is allowed, after the case is at issue, the court will usually impose such terms as it, in its discretion, deems proper, in order that undue advantage can not be taken of the defendant.³ And if a material amendment is permitted at the trial, and the defendant is taken by surprise, a continuance would necessarily be granted, if asked by the defendant.⁴ Amendments to a divorce bill must be verified.⁵

Where a bill is defective from the omission to join necessary parties as co-complainants, or for the joinder of improper parties, it may be amended upon payment of the defendant's costs of the term.⁶

While amendments may be made at any stage of the case, as we have seen, it is settled that it must be done at the earliest opportunity, and that any unreasonable or improper delay will deprive the party of the favorable exercise of the discretion of the court.⁷ Thus the court will not give a com-

¹ *Marble v. Bonhotel*, 35 Ill. 240; *Renwick v. Wilson*, 6 Johns. Ch. R. 81; *Verplank v. M. Ins. Co.*, 1 Edw. Ch. 46; *North R. Bank v. Rogers*, 8 Paige Ch. R. 648; *Hinde Pr.* 25.

² *De Wolf v. Pratt*, 42 Ill. 198; *Walden v. Bodley*, 14 Pet. 156; *Evans v. Billings*, 5 Ala. 550; *Sumrall v. Ryan*, 1 J. J. Marsh. 97; *Clifton v. Haig*, 4 Desaus. 330; 2 McCord Ch. R. 170.

³ *Marble v. Bonhotel*, 35 Ill. 240; *Beekman v. Waters*, 3 Johns. Ch. R. 410; *Vertner v. Griffith*, Walker, 414.

⁴ *Moshier v. Knox College*, 32 Ill. 155; *Baumont v. Boulton*, 5 Ves.

485; *Cook v. Martyn*, 2 Atk. 3; 12 Ves. 215.

⁵ *Briggs v. Briggs*, 20 Mich. 34; *Green v. Green*, 26 Mich. 437.

⁶ *Noyes v. Sawyer*, 3 Vt. 160; *Arendell v. Blackwell*, 1 Dev. Ch. 354; *Stephens v. Terrell*, 3 Monr. 131; *Hoofman v. Marshall*, 1 J. J. Marsh. 64; *Foster v. Hunt*, 3 Bibb. 32; *Gayle v. Singleton*, 1 Stew. 566; *Lindley v. Cravens*, 2 Blackf. 223; *Hutchinson v. Reed*, 1 Hoff. Ch. R. 316; *Gorden v. Holland*, 3 Ired. Ch. 362; 4 Hen. & M. 475.

⁷ 1 Barb. Ch. Pr. 209; 1 Paige Ch. 209.

plainant leave to amend his bill, if he has not taken any step in the prosecution of the suit for an undue length of time as, for instance, for two years after answers put in, he is unable to explain the delay.¹ On filing an amended bill adding new and material averment, it is irregular, though the defendant has failed to appear, to take an order *pro confesso*, on the same day, and without the service of new process.²

When amendments will not be allowed.—Where, on demurrer, a bill has been dismissed on the merits of the case, as stated, for want of equity, the court will not grant leave to amend.³ And a bill sworn to can not be amended by striking out an allegation, except upon affidavit showing that it was inserted by mistake, and how such mistake occurred.⁴

Matter that constitutes a new bill, or that is inconsistent with or repugnant to the substantive allegations of the original bill, can not be introduced by amendment,⁵ and where the bill as amended embraces inconsistent theories, based upon repugnant averments, it should be dismissed on demurrer.⁶

Effect of, after plea.—By amending a bill to which a plea has been filed, the validity of the plea is admitted; but such amended bill stands in the place of a new one, and the plea is no answer to it, it being suspended by the amended bill, to which the defendant has the same time to plead, answer or demur as to the original bill. If the defendant choose to demur to such amended bill, the case stands as if no plea had ever been filed.⁷

And when a complainant files a material amendment after the defendant has pleaded, the latter will be entitled to file additional pleas.⁸

¹ *Altree v. Horden*, 3 Lond. Jurist, 81; 1 Barb. Ch. Pr. 209; *Vertner v. Griffith*, Walker, 414.

² *Harris v. Deitrich*, 29 Mich. 366.

³ *Lyon v. Talmadge*, 1 Johns. Ch. R. 184; *McComas v. Minor*, Walker, 513.

⁴ *North River Bank v. Rogers*, 8 Paige Ch. R. 648; *Verplank v. Mer. Ins. Co.*, 1 Edw. Ch. R. 46; *Brown v. Ricketts*, 2 Johns. Ch. R. 425; *Lathan v. Wiswell*, 2 Ired. 294.

⁵ *Ogden v. Moore*, 95 Mich. 290.

⁶ *Ibid.*

⁷ *Tompkins v. Hollister*, 60 Mich. 470; *Peck v. Burgess*, Walk. Ch. R. 485; see Chancery Rule 16.

⁸ *McCartney v. Neu*, 91 Ill. 127; *Scott v. Cromwell*, Breese (Beecher's Ed.), 25; *Johnson v. Glover*, 19 Ill. (Bradw.) App. Ct. R. 585; see Chancery Rule 16.

No. 75. Petition for leave to amend bill after replication.

(*Title of court and cause.*) To the Circuit Court for the county of ——. In Chancery.

The petition of the above named complainant, respectfully represents unto this honorable court, that the defendant has put in his answer to the complainant's bill; and the petitioner has filed his replication thereto, but no witnesses have been examined by either party. (*Let the petition agree with the facts.*) That since the filing of such replication, the petitioner has been advised by his counsel, and believes, that it is essential to his rights in this cause that the bill should be amended, as shown by the amended bill herewith presented, or, by adding thereto the following statements, etc. (*Here insert the matter proposed to be introduced.*) And the petitioner further represents that he had no knowledge of the facts stated in said proposed amended bill (or, as above set forth), nor was he aware of the necessity of inserting them in his bill until after said replication was filed.

The petitioner, therefore, prays that he may be at liberty to withdraw his said replication, and amend his bill by adding the facts referred to.

A B.

(*Add jurat.*)

Where the petition is for leave to amend a sworn bill, or a bill after replication is filed, the matter proposed as an amendment should be annexed to the petition, and the truth thereof should be sworn to in addition to the usual *jurat* upon the petition.¹

Where the petition is verified by the complainant's solicitor, reasons should be shown why the same would not be sworn to by the complainants, or some of them.²

No. 76. Order for leave to amend bill, after a general demurrer.

(*Caption and title of cause as in No. 34, ante.*) The defendant, C D, having put in a general demurrer to the bill of complaint in this cause for want of equity, on motion of Mr. —, of counsel for the complainant, it is ordered that the complainant have leave to amend his bill as he may be advised, upon payment of the costs to be taxed. It is further ordered that such amendment be filed with the clerk of this court within — days from this date.

No. 77. Amendment to a bill.

(*Title of court and cause.*)

Amendment to the bill of complaint in this cause, made pursuant to an order of the court, entered on the — day of —, A. D. 18—.

¹ *Rogers v. DeForrest*, 3 Edw. Ch. R. 171; *Rogers v. Rogers*, 1 Paige Ch. R. 424; *Whitmarsh v. Campbell*, 2 Paige Ch. R. 67; *Walsh v. Smythe*, 3 Bland, 9; *Everett v. Winn*, 1 S. &

M. Ch. R. 67; *Verplank v. Mer. Ins. Co.*, 1 Edw. Ch. R. 46; *West v. Coke*, 1 Murphy, 191.

² *Verplank v. Mer. Ins. Co.*, 1 Edw. Ch. R. 46.

First. In the third line of the second paragraph of the bill, after the word "and," interline "to wit, on or about the first day of January, A. D. 1870."

Second. After the word "time," in the tenth line of the sixth paragraph, insert the words following. (*Here insert the additional matter proposed.*)

Third. Strike out the words "did convey" in the fourth line of the eleventh paragraph, and insert in lieu thereof the following: "was about to convey."

Fourth. Add the name of "E F, of, etc.," as a defendant, in the second line of the fourteenth paragraph, after the word "and."

Sol. for the complainant.

An amended bill should state no more of the original bill than is necessary to introduce and make intelligible the new matter; nor should such amendment be incorporated in the old bill, but be by separate bill.¹

Amendments to a bill should not be made by interlineations and erasures in the original bill, but by filing the same on a separate paper.² The practice of amending pleadings by erasures and interlineations ought not to be tolerated by the courts. A paper thus disfigured will be stricken from the files.³

¹ *Pierce v. West*, 3 Wash. C. C. R. 354; *Bennington Iron Co. v. Campbell*, 2 Paige Ch. R. 159; *Hunt v. Holland*, 3 Paige Ch. R. 78; *Stansberry v. Moore*, 56 Ill. 472.

² *Walsh v. Smythe*, 3 Bland, 9; *Benzein v. Lovelass*, Cam. & Nor. 521; Hinde Pr. 22.

³ *Stansberry v. Moore*, 56 Ill. 472. See Law Rule 37.

CHAPTER X.

REPLICATION.

Nature of.—After the defendant has put in his answer, the complainant is to determine whether the answer is sufficient, and whether he will amend the bill. If he neither excepts to the answer for insufficiency, nor amends his bill, the usual step next taken by him is to file a replication. This replication, according to the present practice, consists of a general averment only, of the truth and sufficiency of the complainant's bill, and as general a denial of the same properties in the answer of the defendant; but formerly, if the defendant's answer stated new facts, in opposition to those alleged in the bill, the complainant was accustomed to reply by a special statement of other facts, not before charged. This produced a rejoinder by the defendant, asserting the truth and sufficiency of his answer, and alleging the contrary of the complainant's replication. A surrejoinder frequently followed the rejoinder, and a rebutter the surrejoinder, and so on as long as new facts were set forth by one party and denied by the other. But the expense, inconvenience and delay attending these multifarious pleadings on each side gave rise to an alteration of the practice.¹

Special replications are now superseded by the general replication, which merely puts in issue the truth of the answer. Amendments of the bill have been substituted in the place of special replications, and a defendant may now do, in an amendment of a bill, what he formerly could by a special replication.²

Within what time to be filed.—Chancery Rule 12 provides that the complainant shall file a replication to the defendant's answer within fifteen days after service of such answer. Otherwise the cause shall stand for hearing on such bill and answer, unless the time for filing a replication shall be extended.

¹ Barton's Suit in Eq. 124; Story's Eq. Pl. §§ 877, 878.

² Chancery Rule 12 a; Tarleton v.

Veites, 1 Gilm. 870; Schaffer v. Weed, 3 Gilm. 511; White v. Morrison, 11 Ill. 361.

A party who attends and cross-examines witnesses thereby waives default in the service of a replication.¹ The court will sometimes permit a replication to be filed, in furtherance of justice, after a case is called for hearing, when it has been omitted by accident or mistake.²

Where the defendant treats the cause as at issue, joins in taking depositions, and consents to set the cause down for hearing on the bill, answer, exhibits, and depositions, and the cause is heard accordingly, he can not, on error, insist that the proofs shall not be considered.³

Where a replication has been filed, it will be presumed to have been filed in season, until the contrary is proved.⁴

When a decree finds that the cause was heard upon the pleadings, etc., including a replication, the decree, at variance with the answer, will not be reversed merely because no replication appears in the transcript; but leave will be given to file one *nunc pro tunc*.⁵

Where the parties proceed to a hearing on the bill and answer, without a replication, the answer will be taken as true, so far as it is responsive to the allegations of the bill; and no evidence can be received to contradict it, except matters of record to which the answer refers, which are provable by such record.⁶ But if the case is heard upon the pleadings and evidence, the replication will be deemed as waived.⁷

Effect of filing.—If the complainant files a replication to the answer, after he is apprised of the necessity of an amendment of his bill, he precludes himself from making such amendment.⁸

¹ *Brooks v. Mead*, Walk. Ch. 389.

² *Moseley*, 926; *Lord Red.* 267; *Armistead v. Bozman*, 1 *Ired. Ch. R.* 117. See *Insurance Co. v. Day*, 9 *Paige Ch. R.* 247; *Hardwick v. Bassett*, 25 *Mich.* 149.

³ *Marpel v. Scott*, 41 *Ill.* 50; *Corbus v. Teed*, 69 *Ill.* 205.

⁴ *Lyon v. Tallmadge*, 14 *Johns. R.* 501.

⁵ *Hurd v. Ascherman*, 117 *Ill.* 502; see *Brown v. Mortgage Co.*, 110 *Ill.* 235.

⁶ *Derby v. Gage*, 38 *Ill.* 27; *Chambers v. Rowe*, 36 *Ill.* 171; *Farrell v. McKee*, *Id.* 226; *Beems v. Den-*

ham, 2 *Scam.* 58; *De Wolf v. Long*, 2 *Gilm.* 679; *Payne v. Frazier*, 4 *Scam.* 55; *Trout v. Emmons*, 29 *Ill.* 433; *Nelson v. Pinegar*, 30 *Ill.* 473; *Mason v. McGirr*, 28 *Ill.* 322; *Dooley v. Stipp*, 26 *Ill.* 86; *Thomas v. Coultas*, 76 *Ill.* 493.

⁷ *Jameson v. Conway*, 5 *Gilm.* 227, 230; *Webb v. The Alton, etc.*, 5 *Gilm.* 223; *Stark v. Hillibut*, 19 *Ill.* 344; *Marpel v. Scott*, 41 *Ill.* 50; *Demaree v. Driskill*, 3 *Blackf.* 115; *Brooks v. Mead*, Walk. Ch. 389.

⁸ *Vermilyea v. Odell*, 4 *Paige Ch. R.* 121.

Withdrawing.—If the necessity for an amendment arises after the filing of the replication, the complainant should make a special application to the court for leave to withdraw the replication, for the purpose of amending.¹ Upon which application he must satisfy the court, by affidavit, that the matter of the proposed amendment is material, and could not, with reasonable diligence, have been sooner introduced into the bill.² But this practice does not apply to amendments by merely adding parties after replication.³

Special replication.—Chancery Rule 12 provides that a special replication shall not be filed except by leave of the court for cause shown on motion.

When cause is at issue.—Chancery Rule 13 provides that every cause shall be deemed at issue of fact or law on filing a plea or demurrer, or on filing a replication to the answer, or in a case where an answer in the nature of a cross-bill is filed, when a replication and a demurrer, plea or answer, is filed to such answer in the nature of a cross-bill.

That if there be more than one defendant, the cause shall be deemed at issue when replications have been filed to all answers filed, and when an order *pro confesso* has been filed, or entered as to all those defendants who have not answered, or when the cause is discontinued or dismissed as to such defendants.

Form of replication.—Under the Michigan practice the form of replication may be as follows:*

No. 78. Replication to answer.

STATE OF MICHIGAN.

The Circuit Court for the County of ———.

A B,	}	Complainant,
		vs.
C D,		Defendant.

The replication of A B, complainant, to the answer of C D, defendant.

The complainant says that notwithstanding the answer of the defendant, he is entitled to the relief prayed in his bill of complaint.

Sol. for Complainant.

¹ 1 Dan. Ch. Pr. 546; 2 Id. 389;
Coop. Eq. Pl. 333; 1 Barb. Ch. Pr. 253.

² *Id.*; *Id.*

³ *Brattle v. Waterman*, 4 Sim. 125.

⁴ See Chan. Rule 12.

CHAPTER XI.

CIRCUIT COURT COMMISSIONERS.

- Section 1. POWERS OF.
2. WHEN OTHER COMMISSIONERS MAY ACT.
3. PROCEEDINGS BEFORE.
4. REPORT AND PROCEEDINGS THEREON.
5. APPEAL FROM ORDER OF COMMISSIONERS.

SECTION I.

POWERS OF.

The term of office of circuit court commissioners commences on the first day of January succeeding their election, but those elected at the general election, or at a special election, to fill vacancies, may qualify and enter upon the execution of their office immediately after being notified of their election. They hold their respective offices for the term of two years,¹ and are required, at the time of their election, to be attorneys and counselors at law of the Supreme Court.²

The statute confers power on circuit court commissioners to perform all the duties and to execute every act, power, and trust which the judge of a circuit court can execute out of court, according to the rules and practice of such court, and pursuant to the provisions of any statute, in all civil cases, except as therein otherwise provided; but when any power is given in express terms, by any statute, to a circuit judge or to circuit judges, without naming circuit court commissioners in such statute, such commissioners shall not be authorized to exercise any such powers.³

The commissioner is a subordinate assistant to the circuit court, rather than an independent judicial officer.⁴ He can not vacate any order or decree of the circuit court, or any order

¹ See How. Stat. § 7136; Public Acts 1889, No. 32, page 34.

² How. Stat. § 7138.

³ How. Stat. § 7140; see Art. 6, Sec. 6 of the Const.

⁴ *Burger's Case*, 39 Mich. 203.

made by a circuit judge;¹ nor issue a *ne exeat*;² nor to issue the writ of *habeas corpus* where the inquiry contemplates the review or investigation of the proceedings of a judicial tribunal.³ Nor can he be vested with any powers exceeding those of a circuit judge at chambers.⁴

He has power to take bail in criminal cases;⁵ he may act in proceedings to condemn lands for a school-house site, though there is a circuit judge in the county;⁶ to order the transfer of suits from one circuit to another;⁷ to entertain summary proceedings to recover possession of land;⁸ to act as probate judge in certain cases of vacancy;⁹ to allow writs of *certiorari*;¹⁰ to dissolve attachments issuing from the circuit court;¹¹ and to grant injunctions when the circuit judge is absent from the county at the time the application is made, or is disqualified from granting an injunction in the case.¹²

No circuit court commissioner having a law partner in whose name the business of the copartnership shall be carried on is competent to act in any suit or proceeding in which such partner is in any wise interested.¹³

It is the duty of every circuit court commissioner to procure and keep in his office a register, which shall be delivered over to his successor in office, in which he shall enter the title of each cause or proceeding in which he shall make an order and a complete memorandum of his doings therein. And he shall file with the register of the court all orders made by him, together with all papers on which the same are based, immediately upon the making of such order.¹⁴

¹ *Boinay v. Coats*, 17 Mich. 411; *Burger's Case*, *supra*; Chancery Rule 21.

² *Bailey v. Cadwell*, 51 Mich. 217.

³ *Buddington's Case*, 29 Mich. 472; see *Rowe v. Rowe*, 28 Mich. 353.

⁴ *Rowe v. Rowe*, *supra*.

⁵ *Daniels v. People*, 6 Mich. 381; *DeMeyer v. McGonegal*, 32 Mich. 120; *Elder v. Garner*, 97 Mich. 617.

⁶ *Smith v. Milton School District*, 40 Mich. 143.

⁷ *Whipple v. Judge of Saginaw Circuit*, 26 Mich. 342.

⁸ *Streeter v. Paton*, 7 Mich. 341.

⁹ *Kelly v. Edwards*, 38 Mich. 210.

¹⁰ *Loder v. Littlefield*, 39 Mich. 374; *Zook v. Blough*, 42 Mich. 487.

¹¹ *Edgerton v. Hinchman*, 7 Mich. 352; *Albertson v. Edsall*, 16 Mich. 203; *Smith v. Collins*, 41 Mich. 173; *Schall v. Bly*, 43 Mich. 401; *Zook v. Blough*, *supra*.

¹² See Chancery Rule 21 as to restrictions upon powers in injunction matters; also chapter entitled *Injunctions*.

¹³ How. St. § 7149; *Brown v. Byrne*, Walk. Ch. 453; *Heyn v. Far-rar*, 36 Mich. 258.

¹⁴ Chan. Rule 18 b.

SECTION II.

WHEN ANOTHER COMMISSIONER MAY ACT.

In all cases where by law any duties are required to be performed by a circuit court commissioner of any county, and there shall be no such commissioner who is not legally disqualified for acting in the performance thereof, by reason of interest, connection with the matter, or controversy, or in any other cause, the same may be performed by any circuit court commissioner of an adjoining county, who shall not be disqualified, or if the same pertain to a matter, cause or proceeding pending in any circuit court, by a commissioner specially appointed by the judge of said court for the purpose; or, on the written stipulation of the parties interested, by any notary public who is an attorney of the Supreme Court.¹

Before any circuit court commissioner of an adjoining county shall enter upon the performance of any such duties, proof shall be made and presented to him by affidavit that there is no circuit court commissioner of the proper county competent and qualified to discharge such duties, and stating the grounds of disqualification; and such proof shall in all cases accompany the acts, and form part of the proceedings of the commissioner discharging such duties.²

SECTION III.

PROCEEDINGS BEFORE COMMISSIONERS.

Testimony taken by.—Chancery Rule 14 provides that if neither party shall elect to have the testimony taken in open court, under the statute, the testimony shall, without further order, be taken before a circuit court commissioner, unless the parties shall stipulate to take it before some other person authorized to administer oaths.

Time in which to be taken.—The complainant shall put in his testimony in chief within thirty days after the time limited by law for electing to take the proofs in open court; the defend-

¹ How. Stat. § 7156; *Chandler v. Nash*, 5 Mich. 409.

² How. Stat. § 7157.

ant shall put in his testimony within forty days thereafter; and the complainant shall have ten days thereafter in which to put in his rebutting testimony.

At least four days notice shall be given by each party of the time and place of taking such testimony.¹

Fees—By whom paid.—Each party shall pay in the first instance the fees for taking down and transcribing his own examinations or cross-examinations.

Default.—If the complainant shall fail to take any testimony within the forty days above specified, or within the time allowed him by extension, the defendant may notice the cause for hearing on pleadings.

Time for returning.—Within five days after the testimony is concluded, the commissioner, on being applied to for that purpose by either party, shall cause the testimony and exhibits taken to be returned and filed with the register of the court.

Notice for hearing.—At the expiration of the time for taking testimony, the testimony shall be considered closed without order, and either party may thereupon notice the cause for hearing at the next term of court. Such notice must be given at least ten days before the first day of the next term; but if the cause is not in readiness for hearing in time to notice it, it may be noticed for a subsequent day in term, not less than ten days after such notice, and placed at the foot of the calendar.²

Process of subpoena.—Chancery Rule 14 further provides that process of *subpœna* to compel the attendance of witnesses before a commissioner shall issue of course, and the time and place of attendance shall be specified in the writ. Such witnesses may be punished by the court as for contempt if they fail to attend and submit to examination. But no witness can be compelled to appear before a commissioner more than one hundred miles from his place of residence, unless by special order of court.

The testimony must be taken as near as practicable in the manner provided by statute for the taking of depositions, and the commissioner may adjourn the same from day to day as may be deemed proper.³

¹ Chan. Rule 14.

³ How. Stat. § 6644.

² Chan. Rule 14.

This rule obviates the necessity of the entry of orders opening and closing the proofs, and the following forms, Nos. 79 and 80, are therefore *obsolete*.

No. 79. Notice to commissioner of order closing proofs.

(*Title court and cause.*)

To I J, Esq.,

Circuit Court Commissioner.

——— County, Michigan.

Sir: Please to take notice that an order has this day been entered in said cause, closing proofs in the same. You will please file, with the register of said court, the proofs that have been taken before you.

Dated, etc.

Yours, etc.

G H,

Solicitor for defendant.

The commissioner, within ten days after notice of the order to close the proofs, should return and file the proofs taken and introduced before him with the register.

No. 80. Notice to solicitor of order closing proofs.

(*Title court and cause.*)

To E F,

Solicitor for complainant.

Sir: You will please take notice that the annexed is a true copy of an order closing proofs, this day entered in the above entitled cause.

Dated, etc.

Yours, etc.

G H,

Solicitor for defendant.

After an order is entered to take proofs in a cause, either party may serve notice upon his opponent of the taking of his testimony. The notice must be served at least four days before the time set for taking the proofs, and should be in the following form :

No. 81. Notice of examination of witnesses.

(*Title court and cause.*)

To G H,

Solicitor for defendant.

Sir: You will please to take notice that the following witnesses, to wit:

John Doe, residence, ———— Michigan,

John Smith, “ “ “

will be examined on behalf of the above-named complainant, before ————, Esq., a circuit court commissioner in and for said county, at his office in the city of ————, in said county and state. Such exami-

nation to commence on the ——— day of ———, A. D. 18—, at 10 o'clock A. M., and to proceed thereafter as shall suit the convenience of said commissioner.

Dated, etc.

Yours, etc.

E F,

Solicitor for complainant.

Extension of time.—The time for taking testimony may, on motion, for cause shown, be extended; but the party making application for such extension shall be required to show under oath the specific character of the testimony desired.¹

No. 82. Order enlarging time to take proofs.

State of Michigan, ——— Judicial Circuit. In Chancery.

Suit pending in the Circuit Court for the County of ———, in Chancery, at ———, on the ———, day of ———, A. D. 18—.

(*Title of cause.*)

In the above entitled cause, an order for the enlargement of the time for examination of witness therein having been applied for before me by said defendant, on this the ——— day of ———, A. D. 18—, on reading and filing the petition, duly verified, of said defendant for that purpose, and it appearing to me from said petition, that sufficient cause is shown for such extension, and that the time has not heretofore been extended by an order of said court, and that the time for taking the testimony in said cause, as allowed by the rules of court, has not yet expired, therefore it is ordered and decreed that the time for the examination of witnesses in said cause be and the same is hereby extended, or enlarged, until and including the ——— day of ———, A. D. 18—.

A B,

Circuit Court Commissioner

In and for said county.

The order enlarging time should be served upon the opposing solicitor by handing him a true copy, with a notice attached that the same is a true copy, and at the same time, showing him the original order. The original order must be filed in the cause with the register, and an affidavit, showing service of a true copy upon the opposing solicitor, should also be filed.

Proceedings.—The testimony of all witnesses must be reduced to writing by the commissioner and signed by the witness, and it must be filed with the register of the court, where the bill and other pleadings in the cause are filed. Either party, during the period allowed by the rules for tak-

¹ See Rules 14 and 6.

ing proofs, has the right to take his testimony in any order he may choose; and the complainant is not precluded from offering proofs, in support of his original case, by the fact that the defendant has gone into or gone over his defense. The same is true of the defendant. He may put in any relevant testimony at any time before the proofs are closed. The commissioner can not reject testimony offered; it is for the court to decide upon its admissibility.¹

It is improper for a master in chancery, or commissioner acting as master, to perform any official act as master in a cause in which he is solicitor, or a partner of the solicitor.² And where the agent or attorney of the complainant examined witnesses and wrote their depositions, and the commissioner before whom they were taken was absent from the room several times during the examination, and the defendant did not appear and cross-examine the witnesses, the proceedings were held to be irregular and the depositions were suppressed.³

When, after notice of the examination of witnesses, the opposite party appears at the time and place and waits a reasonable time, and no one appears, testimony taken in his absence thereafter is irregular.⁴ In such a case a new notice of examination becomes necessary. And so, when the party who has given notice of an examination of witnesses, appears at the time before the commissioner, he may, after waiting a reasonable time for the opposite party, proceed with his examination *ex parte*.⁵

The practice in Michigan "in the examination of witnesses differs essentially from the practice of the Court of Chancery in England. By the English practice, the examination is in secret, neither the parties nor their counsel being permitted to be present; and the examination is on written interrogatories. With us, the examination is in the presence of the parties and their counsel, and such other persons as choose to attend; and the witnesses are examined and cross-examined by the counsel of the respective parties, as in a trial at law, in the presence of the master, who takes down their testimony," and notes the objections of counsel to the introduction of the proofs.⁶

¹ *Brown v. Brown*, 22 Mich. 246;
Collins v. Jackson, 43 Mich. 558.

⁴ *Stockton v. Williams*, Walk. Ch. 120.

² *Brown v. Byrne*, Walk. Ch. 453.

⁵ *Ibid.* 131.

³ *Burtch v. Hogge*, Har. Ch. 31.

⁶ *Sawyer v. Sawyer*, Walk. Ch. 48.

After a witness has been once examined, and his examination has been closed, he can not be re-examined to the same facts, unless by order of the court; but he may be re-examined as to facts to which he has not been examined, or to new matters arising out of the testimony of other witnesses.¹

The practice with regard to impeaching witnesses, in chancery cases, is with us the same as at law.²

The examination in a creditor's suit, is not confined to the defendant's property or effects, but extends to any matter which he would be required to disclose by answer; and authorizes the examination of witnesses on any matters charged in the bill, and not admitted by the defendant on his examination.³

The testimony in chancery causes, when taken before a circuit court commissioner, notary or justice, should be read over to the witness for correction and authentication by their signatures; and this precaution should not be waived except in cases of absolute necessity.⁴

With regard to the payment of the expense of taking testimony before a commissioner, each party pays for his cross-examination of his adversary's witnesses, and for the direct examination of his own;⁵ this is all that a commissioner can compel a party to pay of the expense of taking the proofs in the first instance, and when this has been paid or tendered, the court will, on motion, compel the commissioner to file the proofs if he refuses so to do.⁶

The rules and practice of the circuit courts in chancery govern the proceedings before a circuit court commissioner so far as they are applicable.⁷

When a witness in a chancery cause resides in a county other than the one in which the suit is pending, the party who desires the testimony, may, if he wishes, notice upon the other side, the taking of the proof before some commissioner of the county in which the witness resides.⁸

¹ *Sawyer v. Sawyer*, Walk. Ch. 51;
1 Hoff. Ch. Pr. 464; *Swinford v. Horne*, 5 Madd. R. 379.

² *Sawyer v. Sawyer*, Walk. Ch. 48.

³ *Howard v. Palmer*, Walk. Ch. 391.

⁴ *Looker v. Looker*, 46 Mich. 68.

⁵ *Sawyer v. Sawyer*, Walk. Ch. 51; *Smith v. Ionia Circuit Judge*, 39 Mich. 122; Chan. Rule 14.

⁶ *Smith v. Ionia Circuit Judge*, 39 Mich. 122.

⁷ Chancery Rule 15.

⁸ *Lyon v. Brunson*, 48 Mich. 194.

Where the testimony of a witness is clearly inadmissible, and its introduction is a plain disregard of the law to the prejudice of a third party, not connected with the suit, the commissioner may decline to receive the proof, at least until he has taken the opinion of the circuit judge upon the subject. In most cases, it is the duty of the commissioner to take all the testimony that is offered, and leave questions of competency to be passed upon afterward; but there may be cases so outrageous as to constitute exceptions; and the case of making use of the opportunity in order to assail a third party, without right and in distinct violation of a statute, ought to be considered such a case.¹

No. 83. Proofs taken before commissioner.

STATE OF MICHIGAN.

The Circuit Court for the County of——. In Chancery.

A B, }
Complainant, }
vs. }
C D, }
Defendant. }

Depositions and proofs taken on the part of the complainant in the above entitled cause, by and before me, E F, a circuit court commissioner in and for the county of ——, aforesaid, at my office in the city of ——, in said county, on the —— day of ——, A. D. 18—.

G H, Esq., appeared for complainant.

I J, Esq., appeared for defendant.

John Doe, a witness produced, sworn and examined on the part of the complainant, testified as follows:

(Here follows the testimony, objections and other proceedings. The testimony may be taken by question and answer, or in narrative form.)

Signed,

JOHN DOE,

Subscribed and sworn to before me, }
this —— day of —— A. D. 18—. }

E F,
Circuit Court Commissioner,
—— County, Mich.

The direct, cross, re-direct and re-cross-examination of a witness should each be signed by him, and the fact of his signing and swearing to the same be certified to by the commissioner as in the foregoing.

¹ *Storrs v. Scougale*, 48 Mich. 387.

*No. 83a. Certificate of commissioner on filing proofs.**(Title of court and cause.)*

I hereby certify that the foregoing are the depositions of the witnesses produced, sworn and examined on the part of the complainant in the above entitled cause.

Dated, etc.

E F,

Circuit Court Commissioner

—county, Mich.

Upon an order of reference to take proofs, a commissioner can not control the order in which they shall be taken; either party, within the period allowed by the rules, has the right to introduce his testimony in any order he may choose.¹ Nor can he reject any offered testimony, as it is for the court at the hearing to decide upon its admissibility.² But there may be cases of offered testimony so grossly improper as to warrant the commissioner in excluding it; as, where it is sought to draw from a physician facts which came to his knowledge when treating a patient.³

A circuit court commissioner ought, in taking testimony, to decline to take down unprofessional statements made by counsel; and the same may be said with reference to scandalous objections.⁴

No party is at liberty to enter an order for taking testimony before a commissioner until after the time for claiming an examination in open court has passed;⁵ and that right can not be claimed until the cause is at issue as to all the defendants, or until those who have not answered have been defaulted. And testimony prematurely taken may be suppressed, or set aside by a rightful claim to have the testimony taken in open court.⁶

Every circuit court commissioner is entitled to all the records and files pertaining to the office of his predecessor, and to suits or proceedings pending and undetermined before his predecessor, and is authorized to hear, try, determine and

¹ *Brown v. Brown*, 23 Mich. 246.

² *Ib.*; *Collins v. Jackson*, 43 Mich. 561.

³ *Storrs v. Scougale*, 48 Mich. 395, 396.

⁴ *Rea v. Rea*, 53 Mich. 40; *Page v. Page*, 51 Mich. 88.

⁵ See Chan. Rule 14.

⁶ *S. C. Hull Lumber Co. v. Gustin*, 54 Mich. 624; *Vermilyea v. Odell*, 1 Edw. Ch. R. 617; *Hastings v. Palmer*, 1 Clarke Ch. R. 52.

dispose of any undetermined suit or proceeding, and fully to conclude the same, and to enforce its determination in the same manner and by the like process as if such suit or proceeding had been originally commenced before him; and also to issue all proper and suitable process for enforcing any judgment or determination of his predecessor or predecessors.¹

Commissioners to act as masters.—The several circuit court commissioners shall, within their respective counties, be competent to discharge all such duties as have heretofore been performed by masters in chancery in this State, according to the practice in chancery proceedings, and all other powers as shall be conferred upon them by the several circuit courts according to law, and shall be amenable to the circuit courts within the jurisdiction and under the orders of which they may respectively act.²

Opening case for further proof on the hearing.—After the proofs in a chancery case have been taken, it is not proper upon the hearing to open the case generally, for the reception of further proofs; nor to open it at all without special reasons, and then usually for the admission only of formal or documentary evidence, or of testimony that has been overlooked by excusable inadvertence.³

Taking accounts.—All parties accounting before a commissioner must bring in their accounts in the form of debtor and creditor; and any of the other parties, who shall not be satisfied with the accounts so brought in, shall be at liberty to examine the accounting party upon interrogatories, as the commissioner may direct. On any reference to take or state an account, the commissioner shall be at liberty to allow interest as shall be just and equitable, without any special direction for that purpose, unless a contrary direction is contained in the order of reference. And every charge, discharge, or state of facts, brought in before a commissioner, shall be verified by oath as true; either positively or upon information and belief.⁴

Persons incidentally interested merely, in an accounting in

¹ How. Stat. § 7155.

² How. Stat. § 7151.

³ *Wendell v. Highstone*, 52 Mich.

552; 1 Barb. Ch. Pr. 322; see *Cox v. Pierce*, 120 Ill. 556.

⁴ See Chancery Rule, 18a.

equity, who are not parties to the suit, are not concluded thereby.¹

The proper course on accounting is for the parties to appear before the commissioner with charge and discharge accounts, and after a full hearing before him, and a report has been filed, to file exceptions thereto, and thus bring the case to a hearing upon such exceptions and report. The circuit judge has power to hear a case for accounting without reference to the commissioner, but when he does so he proceeds as a commissioner would, and the parties should make their complaint of his action in such form that, if the case is appealed, the precise matter in controversy will be indicated by the record.²

One who is aggrieved by a commissioner's findings in stating an account, is deemed to acquiesce therein, unless he distinctly excepts thereto, pointing out, specifically, any error he claims to exist.³

Where exceptions are sustained to a commissioner's report there should be a re-reference to state an account on a basis fixed by the court.⁴

The right of the court to direct an accounting is not taken away by a demand for the examination of witnesses in open court.⁵

SECTION IV.

REPORT OF COMMISSIONER AND PROCEEDINGS THEREON.

In all matters referred to a commissioner, he is at liberty, upon the application of any party interested, to make a separate report or reports from time to time as he shall deem expedient; the costs of such separate reports to be in the discretion of the court. And where the commissioner shall make a separate report of debts or legacies, he shall be at liberty to make such certificate as he thinks fit, with respect to the state of assets; and any person interested shall thereupon be at liberty to apply to the court as he shall be advised.

¹ *Ryerson and another v. Eldred et al.*, 18 Mich. 12.

² *Barnabee v. Beckley*, 43 Mich. 613; see Barb. Ch. Pr.

³ *Singer v. Steele*, 125 Ill. 427. *Crawford v. Osmun*, 90 Mich. 77.

⁴ *Beale v. Beale*, 116 Ill. 292.

⁵ *Schouler v. Bonunder*, 80 Mich. 531.

Confirmation—Exceptions.—After the report is filed either party may file or enter an order of course to confirm the same, unless cause to the contrary thereof be shown in eight days after notice of its being filed; and if no exceptions are filed and served within that time, the order shall become absolute of course, without further order; or either party may file exceptions, and have an order of course to confirm the report, so far as the same is not excepted to, and with the like effect. If either party shall file exceptions to a commissioner's report, such exceptions shall be determined by the court on motion of either party, and the costs thereon shall be in the discretion of the court.¹

No. 84. Order of reference to commissioner to take proof.

(Caption, and title of cause.)

This cause came on to be heard (or to be further heard, as the case may be,) at this term, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.: that this cause be and the same is hereby referred to A B, one of the circuit court commissioners in and for said county, to take the proof of the respective parties; that the said commissioner give notice to the said parties respectively, of the time and place where such proof will be taken, according to the rules and practice of this court, and cause to come before him all such witnesses as the respective parties may desire, and to examine them severally on oath, and reduce their testimony to writing, and report the same, together with his conclusions, to the court.

No. 85. Commissioner's report of testimony.

(Title of court and cause.)

To the Circuit Court for the County of ——. In Chancery.

In pursuance of an order of this court, made in the above entitled cause, on the — day of —, 18—, whereby it was referred to the subscriber, one of the circuit court commissioners for said county, to take the proof of the respective parties, and report the same to the court:

I, the said circuit court commissioner, do hereby respectfully report that, having first summoned the said parties, and notified them of the time and place when and where the said testimony would be taken, and caused to come before me all such witnesses as the respective parties desired or made known to me, and having been attended by the solicitors of the respective parties, I did, on the — day of —, 18—, at my office in —, proceed to take the proofs of the respective parties, and the several witnesses attending having been severally sworn, and examined by me, I reduced their testimony to writing, and have attached the same hereto, and make the same a part of this report.

I would further report that, etc. (*here insert conclusions of facts*), and

¹ Chan. Rule 19.

would, therefore, recommend that, etc. (*Here insert such recommendation as the facts may warrant.*)

All of which is respectfully submitted.

Circuit Court Commissioner,
____county, Mich.

Dated this ____ day of ____, 18—.

Each party should have notice of the report before it is made, and may file exceptions thereto before the master, to enable him to correct it if he thinks proper; and if the master still adheres to his report he returns it into court, where the party objecting may file exceptions; upon the hearing of which the whole evidence is brought forward and passes in review before the court.¹

Either party may file objections to the master's report before he returns it into court. The objections may be in the following form:

No. 86. Objections to commissioner's report.

(*Title of court and cause.*)

Objections taken by the above named defendants to the report of A B, the circuit court commissioner, to whom this cause stands referred to take proofs.

First.—For that the said commissioner has, etc. (*Here state the ground of objection.*)

Second.—For that, etc. (*And so on.*)

In all which particulars the said defendants object to the said report, and submit that the same ought to be varied and altered.

Sol. for defendants.

If the commissioner adheres to his report he returns it into court, where the party objecting may file his exceptions.

No. 87. Exceptions to commissioner's report.

(*Title of court and cause.*)

Exceptions taken by the above named defendants to the report of A B, the circuit court commissioner, to whom this cause was referred to take proof, etc., by an order made herein on, etc., and which report bears date on, etc.

First exception.—For that the said commissioner has, etc. (*Here insert the ground of exception.*)

¹ *McClay v. Norris*, 4 Gilm. 370; *bell v. Hannan*, 43 Ill. 19; *Story v. Brockman v. Aulger*, 12 Ill. 277; *Livingston*, 13 Pet. U. S. R. 359; *Whiteside v. Pulliam*, 25 Ill. 285; *Gunnell v. Bird*, 10 Wall. U. S. R. 306. *Sutphen v. Cushman*, 35 Ill. 202; *Laswell v. Robbins*, 39 Ill. 210; *Camp-*

Second exception.—For that, etc. (*And so on.*)

Wherefore the said defendants do except to the said report, and appeal therefrom to the judgment of this court.

Sol. for defendants.

Exceptions to a report are in the nature of an appeal from the decision of the commissioner to the court which ordered the reference.¹

The report of a commissioner is received as true where no exceptions are taken,² and the exceptions are to be regarded so far only as they are supported by the special statement of the master, or by evidence which ought to be brought before the court by a reference to the particular testimony on which the exceptor relies.³

Exceptions to a commissioner's report must state article by article those parts of the report which are intended to be excepted to; the exceptions are in the nature of a special demurrer, and the party objecting must point out the error, otherwise the part not excepted to will be taken as admitted.⁴

Exceptions to a report on an accounting should be specific and point out wherein the items objected to are not correct; otherwise the exceptions will not be considered.⁵

No exceptions can be taken to the report of a commissioner unless the objection be made before him, previously to his signing his report.⁶

Where a cause is referred to a commissioner to examine and report as to any facts in the case, it is his duty to draw the conclusions from the evidence produced before him, and to report that conclusion only; and it is irregular and improper for him to set forth the evidence in his report without the special direction of the court. If either party excepts to the report, he may then obtain certified copies from the commissioner of the depo-

¹ *Eaton v. Trusdale*, 40 Mich. 5.

² *Butterfield v. Beardsley*, 28 Mich. 422; *Thornton v. Welliker*, 12 Mich. 215.

³ *Harding v. Handy*, 11 Wheat. 103; *Prince v. Cutler*, 69 Ill. 267.

⁴ *Story v. Livingston*, 13 Pet. U. S. R. 359; *Dexter v. Arnold*, 2 Sum-

ner, 108; *Wilkes v. Rogers*, 6 Johns. Ch. R. 566.

⁵ *Crawford v. Osmun*, 90 Mich. 77.

⁶ *Methodist Church v. Jaques*, 3 Johns. Ch. R. 77; *Beckwith v. Butler*, 1 Wash. Va. 224; *Foote v. Van Ranst*, 1 Hill. Ch. R. 185; *Lewis v. Lewis*, Minor, 35; *Pennell v. Lamar Ins. Co.*, 73 Ill. 303.

sitions, or other evidence on which the decision of the master was founded, to be used on the argument of the exception.¹

SECTION V.

APPEAL FROM ORDER OF COMMISSIONER.

Any person conceiving himself aggrieved by an order made by any circuit court commissioner, in any suit in chancery, may appeal therefrom to the circuit court of the county in which such suit is pending: *Provided* (1), that such appeal shall be claimed and entered within fifteen days from the time of making such order; and (2), that the appellant shall, within that time, execute a bond to the appellee in such penal sum, not less than one hundred dollars, as the commissioner shall prescribe, with sufficient surety, to be approved by the commissioner, conditioned to pay, satisfy and perform the order which by the circuit court may be made in the premises, and to pay all costs in case the order appealed from shall be affirmed. But no such appeal shall operate as a stay of proceedings, unless a special order to that effect shall be made by the circuit judge or by such circuit court commissioner on proper cause shown.²

The appeal bond mentioned in the preceding rule shall be filed with the circuit court commissioner approving the same, and shall be returned with the appeal papers.³

It shall be the duty of the appellant, under these rules, to file with the circuit court commissioner, within the time above limited for claiming and entering his appeal, his reasons for such appeal; whereupon it shall be the duty of such commissioner, within twenty days thereafter, to transmit to the clerk of the circuit court said bond, and all papers upon which the motion or proceeding may have been founded, or which may have been used on such motion or proceeding, unless already so filed, certified by him; or, in case the original pleadings or files shall have been used, he shall certify such fact to the court with a description of the original papers so used.⁴

¹ *Prince v. Cutler*, 69 Ill. 267; *Mott v. Harrington*, 15 Vt. 185; *Goodman v. Jones*, 26 Conn. 264; *In the matter of Hemiup*, 3 Paige, 306.

² Chancery Rule 20 a.

³ Chancery Rule 20 b.

⁴ Chancery Rule 20 c. As to fees of commissioners, see How. Stat. § 9009.

CHAPTER XII.

TESTIMONY.

- Section 1. TESTIMONY TAKEN IN OPEN COURT.
2. DEPOSITIONS.
3. PROVING DOCUMENTS AT THE HEARING.
4. PRODUCTION OF BOOKS AND PAPERS.

After a cause is at issue, either party may, within ten days thereafter, give notice of his intention to take the testimony in the case in open court.¹

If no replication is filed, as we have seen, the answer will be taken as true so far as it is responsive to the bill, and the defendant will need no proof, and the complainant, not having replied, can not offer any.

The space allotted to this work precludes our going into an examination of the subject of evidence, any further than to point out the methods of taking the testimony of witnesses, to be read on the hearing. And upon this, we will necessarily be confined to the modes as they exist in Michigan.

Parties may take evidence before a circuit court commissioner, by deposition, in open court, or by stipulation before a notary or justice.²

Before commissioner.—We have already devoted considerable space in considering the proceedings before circuit court commissioners in taking testimony and upon reference, giving forms connected therewith.³

SECTION I.

TAKING TESTIMONY IN OPEN COURT.

Under the statute either party to a cause in chancery has the right to an examination of all the witnesses in the case in

¹ Chan. Rule 14; How. St. § 6647.

² See Chan. Rule 14.

³ See Chapter XI, entitled Circuit Court Commissioners.

open court as in a suit at law, if within ten days after the cause is at issue he gives notice in writing to the opposite party of his intention to claim such right; in which case no examination is had before a circuit court commissioner, but the cause is heard in its course on the calendar by examination of witnesses in open court, unless the court shall on cause shown otherwise direct, as in a suit at law.¹

This does not, however, deprive the court of the right, upon application of either party, to make an order directing a commissioner to take the depositions of witnesses outside of the jurisdiction of the court, or in cases where the party may be deprived of material testimony or rights, if such commission is not issued.²

Chancery Rule 14 provides that if either party shall elect to have the testimony taken in open court, under the statute, and the cause is at issue as to all parties, the cause may thereafter be noticed for trial and hearing in open court by either party. Such notice may be countermanded in the same manner and with like effect as a notice of trial in an action of law.³

Said rule further provides that in causes where there are more than one defendant, the complainant shall, when the cause is at issue, serve upon the solicitors for such defendant or defendants who have appeared and answered and whose answers have been replied to, a notice that such cause is at issue; or the solicitor for any defendant may serve like notice upon the complainant and the other defendants who have appeared; and the time for either party to give notice of intention to claim the right to examine witnesses in open court, shall commence from the time such notice is served. In cases where the notice of such intention is given by a defendant, he shall serve the same upon the solicitors of all co-defendants who have answered, as well as upon the complainant's solicitor. Proof of service of such notice shall be filed with the register in chancery.

When a party claims the right to take his proofs in open court, the court sits, as does the circuit court commissioner, with no power to control the order of proofs, to any extent,

¹ Laws 1895, page 348.

² See Law Rule 13.

³ *Ibid.*

and with no power to rule out or to refuse to receive testimony.¹

The stenographer usually takes down the testimony, and the proceedings are much the same as when the testimony is taken before a commissioner. Where either party has taken the proper steps to have witnesses examined in open court, the circuit judge has no power, at chambers, to order the proofs to be taken by a commissioner;² and such void order can not receive any vitality, nor can any validity be given to proofs taken under it, by virtue of a subsequent order, entered *nunc pro tunc*.³

The court, even when proofs are taken before a commissioner, can call upon and compel either party to a cause at issue, or any witness thereto, to testify in open court. It can compel either party to a divorce suit, when at issue, or the complainant, on bill confessed, to testify in like manner;⁴ but no party or witness, whose evidence may not be received under the statute, can be called upon to testify.⁵

Settling case.—It is provided by statute⁶ that when a chancery case is tried in open court, either party is entitled to make and settle a case, setting forth in substance all the evidence before the judge who tried the same, at such time and manner as the judge shall direct, as are now prescribed by the rules of court, for the settling of bills of exceptions in cases at law.⁷ And such case being made and filed within sixty days after the entry of the final order or decree therein, the same shall be deemed to be the evidence and proceedings therein for all purposes of review on appeal to the Supreme Court.

The circuit court in which such case has been tried, or the judge thereof, shall have power on special motion and proper showing, to grant an extension of the time for making and filing such case for a period not exceeding four months from and after the date of the entry of such decree or final order,

¹ *Hewlett v. Shaw*, 9 Mich. 346.

² *Eslow v. The Township of Albion*, 27 Mich. 4.

³ *Eslow v. The Township of Albion*, 32 Mich. 150.

⁴ Law Rule 25; How. St. § 6424:

Hamilton v. Hamilton, 37 Mich. 603.

⁵ How. St. Sup. § 6242; see *Eaton v. Knowles*, 61 Mich. 683; *Spry v. Barge*, 76 Mich. 320.

⁶ How. St. § 6647.

⁷ See Law Rule 48; Chan. Rule 15.

and upon the case so made and filed, an appeal may be taken to the Supreme Court, by any of the parties, as in ordinary chancery cases.¹

A copy of the judge's minutes of the testimony taken and certified to by him is not a settlement of a case within the meaning of the statute.² Neither is a copy of the stenographer's transcript of his notes of the evidence, which have merely been filed in the cause, and sent up with the return without being in any way authenticated as a case settled, sufficient.³

The proper course in this class of cases, whether the testimony has been taken by a stenographer or not, is for the party desiring the testimony to be certified to the Supreme Court, to make a case setting it forth, present it to the circuit judge, and procure his order, fixing the time and place when and where it shall be settled, and give notice to the opposite party, that he may attend and propose amendments; or instead thereof to take other proceedings equivalent. The practice should be assimilated, as near as may be, to that of making cases for review at law. This course will secure to each party a full opportunity to have the testimony exhibited in the Supreme Court substantially, if not literally, the same as that exhibited below.⁴

When proofs have been taken in open court in a chancery cause, an appeal taken, and an effort made to have the case settled under and within the time fixed by the statute, but which failed or was imperfectly done from circumstances not caused by or within the control of the appellant, such as the failure of the stenographer to furnish a copy of the testimony, or the circuit judge to properly settle or certify the same, the appellant may in the Supreme Court have an order extending the time to perfect his appeal; or if return has been made, the proper certificate may be obtained from the circuit judge and filed with the record, that the case was settled and that the proofs returned are correct. In such cases, the Supreme Court having obtained jurisdiction of the cause, an opportu-

¹ How. St., § 6647.

² *Wright v. Dudley*, 8 Mich. 76.

³ *McBride v. Rea*, 33 Mich. 347;

Moote v. Scrivin, 33 Mich. 500.

⁴ *Wright v. Dudley*, 8 Mich. 77.

nity will be afforded the appellant to correct such defects as were not caused solely by his own negligence.¹

The original minutes of oral testimony, taken in open court in a chancery case, must not be removed from the files to be used as copy in printing the record, unless by order of the Supreme Court.²

When testimony is taken in open court in a chancery suit the judge has no authority to absolutely reject testimony unless of a nature so scandalous as not to be proper to appear in the record of the proceedings. If testimony is forced into a case which is evidently irrelevant and immaterial, a motion may be made to expunge it and the court may order it expunged, with costs against the solicitor insisting upon its being taken, but it must be returned on appeal, in order that the Appellate Court may pass on the correctness of the ruling.³

The only exceptions to the rule are when, on the ground of public policy, the testimony should not be permitted to be elicited, as in case of a flagrant attempt to disregard the privileges of witnesses, or where it becomes necessary to fix a reasonable limit to the number of witnesses called to a single point, as in case of an attempted impeachment. But ordinarily the offered testimony should be taken subject to objection.⁴

SECTION II.

DEPOSITIONS OF NON-RESIDENT WITNESSES.

The statute provides that the testimony of any witness may be taken by deposition *de bene esse*, in any civil cause or matter begun or pending in any court of record, at law or in chancery, or before any probate court, or commissioners on claims appointed by any probate court or arbitrators, referees or circuit court commissioner, or justice of the peace in the State of Michigan, or in any other civil proceedings when the witness is or is about to go or resides out of the State of Michigan, or is about to go, or reside more than fifty miles from the place of trial, or beyond the jurisdiction of the court; or when the witness is sick, aged or infirm, or where there is reasonable

¹ *Graves v. Wasey*, 45 Mich. 224.

² *Meech v. Lee*, 82 Mich. 274.

³ *Lamb v. Hinman*, 46 Mich. 112.

⁴ *Merson v. Merson*, 101 Mich. 55.

cause for apprehension that his testimony can not be had at the trial of the cause, or where it is needed for use on hearing of motions, petitions, proceedings for injunctions, or upon any other interlocutory or other proceeding prior to final hearing of any cause; and in all cases where affidavits are permitted to be used in proceedings before the court; also when it is desired to take conditionally and perpetuate testimony in suits to be begun; and in any other case not above provided for when it shall appear to the court or judge thereof that the purposes of justice will be aided thereby.¹

Before whom may be taken.—The deposition may be taken before any judge of any court of the United States, or of any State of the United States, or of any foreign country, or before any commissioner of a circuit court in Michigan, or of the United States, or of any State, or any commissioner for Michigan, or any consul, or consular officer, justice of the peace, officer, or notary public, authorized by the laws of this State, or of any other State, or of the United States, or by the laws of any foreign country, to administer oaths, not being of counsel or attorney for either of the parties, not interested in the event of the cause.²

The seal of such court or official, or a certificate of such authority, given under the seal of any court of record, shall be *prima facie* evidence of authority to act.³

Notice to be given.—Reasonable notice must first be given in writing by the party, his attorney or solicitor, proposing to take such deposition to the opposite party, or his attorney of record, which notice shall state the name of the witness or witnesses, and the time and place of taking his deposition, and the name of the official before whom the same will be taken, and in all cases *in rem*, attachment or replevin, the person having the agency or possession of the property at the time of seizure, shall be deemed the adverse party until a claim shall have been put in or appearance entered in the cause; and whenever, by reason of the absence from the jurisdiction of the party, or want of an opposite attorney of record, or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there

¹ Pub. Acts 1895, p. 334.

³ *Ibid.*, p. 335.

² *Ibid.*, p. 334.

shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts within the jurisdiction where the suit is begun, shall think reasonable and direct.¹

When may be taken under commission.—In any case where the deposition of a witness can be taken upon notice, his deposition may instead be taken under commission, and any circuit court commissioner in the State of Michigan, or the court in which such proceeding is begun or pending, or the judge, clerk or register thereof, or in any case pending before a justice of the peace, such justice shall upon affidavit showing reason therefor, issue a commission for the taking of the testimony of such witness before any person therein appointed as commissioner.²

Written interrogatories.—Written interrogatories to be put to such witness by such commissioner, may be attached to the commission; if attached, a copy thereof shall be attached to the notice which shall in any case be given to the opposite party or his attorney or solicitor, of the time and place of taking testimony under such commission. Cross and redirect interrogatories, which it is desired the commissioner shall put to the witness, shall thereupon be promptly furnished to the respective parties, and to such commissioner. Where default or order, *pro confesso*, has been entered in the cause, notices shall not be necessary.³

Witness may be compelled to appear and depose.—Any person may be compelled to appear and depose by the order or process of any court and to produce books and papers in the same manner as witnesses may be compelled to appear and testify in court.⁴

Testimony may be written or taken stenographically.—Testimony may be written or taken stenographically and transcribed under direction of the officer so taking the same and shall be signed by the witness and certified as correct by the official before whom it is taken, but signatures of witnesses may be waived in writing by agreement of parties.⁵

May be examined orally.—Every witness may be examined,

¹ *Ibid.*, p. 335. See *Record v. Merwin*, 72 N. W. 998; *Drosdowski v. Chosen Friends*, *Ibid.*, 3.

² Pub. Laws, 1895, p. 335.

³ *Ibid.*, p. 335.

⁴ *Ibid.*, p. 335.

⁵ *Ibid.*, p. 336.

cross-examined, and re-examined orally, and also so examined in addition to written, direct or cross-interrogatories. Examinations may be adjourned from time to time.¹

Witness shall be sworn.—Each witness shall be sworn or affirmed by the officer or person empowered to take testimony, to tell the truth, the whole truth, and nothing but the truth, concerning the matter at issue in the cause.²

By stipulation.—Parties to action and parties interested in suits to be begun may have testimony taken and returned in any manner agreed upon by stipulation in writing.³

Court shall have power to regulate use of depositions.—Depositions taken under this act may be read and considered in evidence at the trial or on any hearing, and on appeals and retrials of the same cause of action, but the court shall have power to regulate the use, to prevent abuses thereof, and may order the retaking of testimony, or the production of the witness, if within the jurisdiction, notwithstanding that his deposition has been taken. In any case, either party may obtain *subpoena* and compel the usual attendance and re-examination of the witness, notwithstanding his deposition has been taken, if he is within the jurisdiction of the court and able to attend, and give his testimony in the usual way, for or at the trial.⁴

How transmitted.—The deposition when taken shall be forthwith enclosed by the official before whom the same is taken, and indorsed with the title of the court and cause, and that the deposition was taken and sealed up by him, and how it is to be sent, and he shall sign the indorsement, and the same shall be transmitted by mail or otherwise, to the court in which the cause is pending, and in case such deposition is taken for use before commissioners on claims, appointed by any probate court, to such court, and then be opened by the court or clerk or register, and written notice thereof then given by mail or otherwise to the parties.⁵

Objections to.—Objections to notices of, or objections to the manner of taking the testimony, or of certifying or returning the deposition, shall be regarded as waived, unless

¹ Pub. Laws 1895, p. 336.

² *Ibid.*, p. 336; *Ford v. Cheever*,
105 Mich. 679.

³ *Ibid.*, p. 336.

⁴ *Ibid.*, p. 336.

⁵ Pub. Acts, 1895, p. 336.

made in writing within three days after knowledge or notice of the return thereof.¹

Such objections shall be noticed for hearing before the court, by motion to suppress, or otherwise, by the party making the same, within five days after such objections are made, and if not so noticed for hearing, the same shall be considered waived.²

Courts have power to compel attendance of witnesses.—Courts of record of this State shall have the power to compel the attendance of witnesses and the giving of their testimony, and the production of books, papers and other evidences, before commissioners or persons authorized to take testimony, and also under commissions, or letters rogatory, issued out of any court of any other State, or of the United States, or of any foreign government or country.³

May be used by either party.—When a deposition has been taken by either party, it may at any time be read by the other party on the trial.⁴

To perpetuate testimony.—To perpetuate testimony, any person who expects to be a party to a suit, which may thereafter be commenced in any court of record, may cause the testimony of any witness material to him in the prosecution of defense to such suit, to be taken conditionally, and perpetuated, under a commission so issued by any Circuit Court commissioner or judge of a court of record, upon affidavit, showing the necessity or reason therefor, and, so far as known, the person interested in such matter. The commission shall direct upon whom notice shall be served, and to what court the deposition shall be returned, and such court shall have custody and control thereof until required for use in such suit. Testimony taken under this section may be used in case it can not again be obtained at the time of trial.⁵

No. 88. Notice to take deposition.

(Title of court and cause.)

To the above named C D, *defendant*.

Take notice that on, etc., between the hours of — A. M. and — P. M., at, etc., before J. K. a *notary public* in and for said county and State, the com-

¹ Pub. Laws 1895, p. 336.

⁴ Law Rule 41.

² Law Rule 41.

⁵ Pub. Laws 1895, p. 336.

³ Pub. Laws 1895, p. 335.

plainant will proceed to cause to be taken the deposition of L M, residing in the said county of —, to be read in evidence on the trial of this cause, on the part of the complainant; at which time and place you can appear and cross-examine the said witness, if you shall see fit so to do.

(Date).

E F,
Solicitor for Complainant.

No. 89. Petition to register that commission issue.

(Title of court and cause.)

To E F, register in chancery, in and for said county.

The petitioner, C D, respectfully represents to this honorable court that he is the *defendant* in the above entitled cause, which cause is now pending in said court. He also shows that said cause is at issue, and that the proofs have not been closed.

Your petitioner further states that the testimony of *John Doe*, of, etc., is material and necessary to petitioner in his *defense* of said cause.

That the said John Doe is a non-resident of this State, (or "is about to depart from this State," or "is sick," etc., as the case may be).

Your petitioner therefore prays that a commission may be issued to take the examination of John Doe, residing at —, in the city of —, which said commission may be directed to Richard Roe, a notary public in and for the county of —, in the State of —, residing at (*No. and street*), in the city of —, authorizing and empowering him to take the testimony of said John Doe, upon oath and upon written interrogatories, to be hereunto annexed, and to return the same when taken to the register of this court to be read upon the trial of this cause.

C D,
G H, Solicitor for defendant.

STATE OF MICHIGAN, }
County of ———. } ss.

On this — day of —, A. D. 18—, personally appeared before me the above named C D, and made oath that he had (*read or heard read*) the foregoing petition by him subscribed, and that the same is true, of his own knowledge, except as to matters therein stated to be on information and belief; and as to those matters, he believes it to be true.

I J, Notary Public,
—— County, Michigan.

No. 90. Notice and interrogatories for taking deposition upon interrogatories in writing.

(Title of court and cause.)

To the above named C D, —.

Take notice, that on, etc., the — will sue out from the clerk's office of the said court a commission, pursuant to the statute, to take the deposition of L M, residing in the city of —, in the county of —, and State of —, to be read in evidence on the part of the — on the trial of this cause. The interrogatories to be propounded to the said L M in

this behalf, on the part of the ———, are hereto subjoined; and you can file cross-interrogatories, and join in such commission, if you shall see fit so to do.

(Date.)

E F, Sol. for ———.

(Title of court and cause.)

Interrogatories to be propounded to L. M., a witness to be produced, sworn and examined in this behalf, on the part of the ———, by virtue of the commission to be issued in pursuance of the foregoing notice:

Interrogatory 1. What is your name, age, occupation and place of residence?

Int. 2. Do you know the parties complainant and defendant in this cause, or either of them? If yea, how long have you known them respectively?

(Proceed with the interrogatories—numbering them consecutively—touching the matters desired to be proved.)

Lastly. Do you know of any other matter or thing, of benefit or advantage to the ———, touching the matters in controversy in this cause, in addition to what you have already stated? If yea, state the same as fully as if thereto particularly interrogated.

E F, Sol. for ———.

No. 91. Notice of application for commission.

(Title court and cause.)

To K L,

Solicitor for complainant.

Sir: You will please to take notice that the annexed is a true copy of a petition that I shall present to ———, Esq., register of said court, at his office, in the city of ———, at ten o'clock of ———, the ——— day of ———, A. D. 18——. (At least ten days' notice must be given.) You are at liberty to join in said commission if you so desire.

Dated, ———, etc.

G H,

Solicitor for defendant.

No. 92. Commission to take testimony.

STATE OF MICHIGAN, }
County of ——— } ss.

In the Circuit Court of the County of ———. In Chancery. In the name of the People of the State of Michigan:

[SEAL.] To ——— and ——— of, ——— in the State of ———,
GREETING:

Whereas, it appears to our circuit court for the county of ———, in chancery, that ——— are material witnesses in a certain cause now pending therein, between ———, complainant-, and ——— defendant-, and that the said witnesses are not residents of the State of Michigan, we, in confidence of your prudence and fidelity, have appointed you, or either of you, commissioners to examine the said ———, and therefore we authorize and empower you, or either of you, at certain days and places to be by you, or either of you, for that purpose appointed, diligently to examine the said witnesses, or each of them, as shall be produced before you, and each apart, on the interrogatories annexed to this commission, on their

respective corporal oaths (or affirmations) first taken before you or either of you, and cause the said examination to be reduced to writing and signed by said witnesses, respectively, and by yourselves, or such of you as are present at the taking of the same, and then return the same, annexed to this commission, into our said court, with all convenient speed, inclosed under your seals or the seal of such as are present at the execution of this commission. And you will in all things be governed in the business by the instructions hereto annexed.

Witness the honorable ———, circuit judge, at ———, this — day of ———, in the year of our Lord one thousand eight hundred and ———,
—————, Register.

SECTION III.

PROVING DOCUMENTS AT HEARING.

Law Rule 23, which, by Chancery Rule 15, is made applicable to chancery causes, provides that either party may exhibit to the other, or to his attorney, at any time before the trial, any paper material to the action, and request an admission in writing of its genuineness.

If the adverse party, or his attorney, fail to give the admission within four days after the request, and the delivery to him of a copy thereof, if such copy be required, and if the party exhibiting the paper be afterward put to expense in order to prove its genuineness, and the same be finally proved or admitted on the trial, such expense, to be ascertained and summarily taxed at the trial, shall be paid by the party refusing admission, unless it shall appear to the satisfaction of the court, that there were good reasons for the refusal, and an attachment or execution may be granted to enforce the payment of such expenses.

By referring, in a bill of complaint, to a deed or other instrument in this wise—"as in and by said indenture, reference being thereunto had, when produced will more fully and at large appear," the whole document referred to is made a part of the record, although not fully or accurately recited in the bill, and the complainant may, at the hearing, avail himself of such portions as are not recited, and also those portions inaccurately set forth.¹

A mortgage or other security, set forth and referred to in

¹ *Swetland v. Swetland*, 3 Mich. 482.

the bill and made a ground of relief, becomes a necessary part of the record, and if not denied in the answer, needs no formal proof;¹ and documentary evidence submitted at the hearing need not, for the purposes of appeal, be authenticated by the judge.²

SECTION IV.

PRODUCTION OF BOOKS AND PAPERS.

If a party refuses to produce books and papers, his opponent may give secondary or parol proof of their contents, if they are shown to be in possession of the opposite party.³

The notice should be given seasonably, in order to give the party reasonable time to produce the original.⁴

A certified copy of a deed from the record can be used, on the proper preliminary proof being made, without notice to the opposite party to produce the original.⁵

The better practice is to give notice to produce papers in the possession of the opposite party before entering upon the trial, but the reasonableness of the notice depends upon the circumstances of each case, and is a matter for the court.⁶

The notice to the opposite party to produce a written instrument may be in the following form:

No. 93. Notice to produce written instrument on trial.

(Title of court and cause.)

To the above named C D, *defendant*:

You will please produce, on the trial of this cause, a certain (*here describe the instrument with such particularity as to apprise the party of what is required.*) Otherwise the complainant will offer secondary evidence of the contents of the said instrument.

(Date.)

E F, Attorney for complainant.

¹ *Mickle v. Maxfield*, 42 Mich. 304.

² *Stone v. Welling*, 14 Mich. 514.

³ *Rector v. Rector*, 3 Gilm. 105; *Prettyman v. Wolston*, 34 Ill. 190; *Keagle v. Pessell*, 91 Mich. 618; *People v. Swetland*, 77 Mich. 53; *Hood v. Olin*, 80 Mich. 296; *Mortlock v. Williams*, 76 Mich. 568.

⁴ *Cody v. Hough*, 20 Ill. 43; *Warner v. Campbell*, 26 Ill. 282; *Bushnell v. Bishop Hill Colony*, 28 Ill. 204.

⁵ *Bowman v. Wettig*, 39 Ill. 416; *Deininger v. McConnell*, 41 Ill. 228.

⁶ *Hanselman v. Doyle*, 90 Mich. 142.

Prior to hearing.—The court only orders the production of books and papers previous to the final hearing of a cause, upon two principles—security pending the litigation, and discovery or inspection for the purpose of the suit.¹

The court will, upon the application of the defendant, before answer, under special circumstances, order that the complainant should not compel him to answer until within a stated time after the production of certain documents set forth in the bill when it appears that their production is essential to enable the defendant to put in his answer.²

After the pleadings are settled in a case, a party may petition for the discovery and exhibition of the adverse party's books of account. But such applications rest, with great reason, upon very strict grounds; and they can not be lawfully granted unless it is shown affirmatively, and with great certainty and distinctness, that a real necessity exists. Mere convenience, or curiosity, or surmise, or need, afford no basis for the proceeding. It must appear from the application that the production is indispensably necessary; and the ability to obtain it, together with the testimony of the party, by *subpœna duces tecum*, must be negatived.³

Portions may be sealed up.—While the course of judicial investigation frequently requires a party to produce parts of his books in which the adverse party has an interest, for the inspection of the latter, it may frequently be of great importance to the former that his accounts and transactions with other persons shall not be exposed to the examination of strangers, and particularly of an unfriendly adversary. Where books are subject to inspection, it is the uniform practice of the court to permit a party to seal up those parts which do not relate to the subject of the litigation.⁴

Documents, etc., in the hands of third persons.—If docu-

¹ *Watts v. Lawrence*, 3 Paige Ch. R. 159.

² *Princess of Wales v. Earl of Liverpool*, 1 Swanst. 114; 1 Barb. Ch. Pr. 101; *Jones v. Lewis*, 2 Sim. & Stu. R. 242; see *Cornell v. Bostwick*, 3 Paige Ch. R. 160.

³ *Van Zandt v. Cobb*, 12 How. Pr. R. 544; *Cummer v. Kent*, Judge, 38

Mich. 351, 354; *Woods v. De Figan-
iere*, 1 Robert, 681; *McAllister v.
Pond*, 6 Duer, 702; *McKeon v. Lane*,
2 Hall, 520; *Moore v. McIntosh*, 18
Wend. 529; *Commercial Bank of Al-
bany v. Dunham*, 13 How. Pr. 544;
Brevoort v. Warner, 8 How. Pr.
321; 3 Greenl. on Ev. § 301.

⁴ *Diaz v. Merrill*, 2 Paige, 494;

ments, the production of which is desired, are in the possession of one who is not a party to the suit, he may be compelled by a *subpœna duces tecum* to produce them; and if the *subpœna* is not obeyed, he will be punished for contempt, on proof by affidavit that the documents are in his custody.¹

A notice to an attorney to produce letters to be used in evidence on a trial, which are in the possession of his client in another State, and to procure which required that they be forwarded by the next mail after the receipt of a telegram to mail them, was held to be unreasonably short.²

Girard v. Penswick, 1 Swanst. 533; ¹ 3 Greenl. Ev. § 305; also see
U. S. v. Babcock, 3 Dillon C. C. R. 1 *Id.* §§ 558, 559.
 536; *Ex parte Brown*, 72 Mo. 83; see ² *Optical Co. v. Treat*, 72 Mich.
Lowenthal v. McCormick, 101 Ill. 599; see *Mortlock v. Williams*, 76
 150. Mich. 568.

CHAPTER XIII.

FEIGNED ISSUES—TRIAL BY JURY.

Nature of.—*A feigned issue* is an issue brought by consent of the parties, or the direction of a court of equity, or such courts as possess equitable powers, to determine before a jury some disputed matter of fact, which the court has not the power, or is unwilling to decide.¹

There are two methods of trying questions of fact by a jury, on issues joined in chancery, viz.: by *feigned issues* awarded under the old practice, and by *issues of facts* under the rule which provides that in cases where feigned issues have been in use, the issue shall be made hereafter by presenting the questions to be tried in a simple form upon the facts. The issue, unless agreed upon, should be framed by the circuit judge, and in all cases shall be approved by him.²

An issue must be confined to facts put in issue by the pleading.³

The statute provides⁴ that “if there be an issue of fact which, in the opinion of the court, shall render the intervention of a jury necessary and proper, said court shall, on request of either party, order a jury impaneled for the trial thereof, and the verdict of such jury may be used on the hearing of the cause.”

A court of chancery sometimes awards issues or other modes of inquiry, in order to satisfy its own conscience, where the testimony on well defined issues is conflicting.⁵

The verdict of the jury has no binding force, and is only intended as an aid to the conscience of the court.⁶

¹Bouv. L. D. 516; 3 Black. Com. § 6646. See *Russell v. Payne*, 45 452; Bouv. Inst. Index, h, t. Ill. 350.

²*Milk v. Moore*, 39 Ill. 588.

³*Dunn v. Dunn*, 11 Mich. 288.

⁵*Wendell v. Highstone*, 52 Mich. 553.

⁴Comp. L. 1871, § 5092; How. St.

⁶*Dunn v. Dunn*, 11 Mich. 285;

A feigned issue may be ordered to determine whether a deed was intended as a mortgage;¹ or was made to defraud creditors;² or whether fraud existed in the consideration of a mortgage.³ It is also proper where the defendant denies the execution of the note described in the mortgage, and the evidence is contradictory;⁴ or where a deed is sought to be avoided for insanity of the grantor;⁵ and also to test heirship.⁶

A feigned issue need not include all the points involved in the suit.⁷

Where the evidence is contradictory, the veracity of the witnesses involved, and where the manner, intelligence and relation of witnesses to a case must have their proper weight, it is highly desirable to have the issues tried by a jury.⁸

"The chancellor is the sole judge of the evidence and its weight; and, even when he directs an issue of fact to be tried by a jury to inform his conscience, he may adopt the verdict of the jury, or he may disregard it, and render a decree against their finding, or he may grant a new trial, as he may believe justice demands. In our courts of equity, the chancellor being also the common law judge, he necessarily hears all of the evidence upon which the jury acts, and if satisfied the jury have found correctly, it would be his duty to adopt their finding; but, if dissatisfied, it would be equally his duty to disregard the verdict, and proceed with the cause in such manner as to do complete justice between the parties."⁹

The court may award a new trial, not only to satisfy its conscience, but to correct any errors in its instructions to the jury, or any other errors on the trial.¹⁰ And a court of chancery is more liberal in granting new trials on feigned issues than courts at law.¹¹

Kelly v. Kelly, 126 Ill. 557; *Brown v. Kalamazoo*, 75 Mich. 274.

¹ *Williams v. Bishop*, 15 Ill. 108.

² *Waddams v. Humphrey*, 22 Ill. 661.

³ *Milk v. Moore*, 39 Ill. 587.

⁴ *Russell v. Payne*, 45 Ill. 350.

⁵ *Myatt v. Walker*, 44 Ill. 485.

⁶ *McConnel v. Smith*, 27 Ill. 234.

⁷ *Pankey v. Raun*, 51 Ill. 88.

⁸ *Russell v. Paine*, 45 Ill. 350.

⁹ *Dunn v. Dunn*, 11 Mich. 288; *Milk v. Moore*, 39 Ill. 588; *Williams v. Bishop*, 15 Ill. 553; *Sibert v. McAvoy*, *Id.* 108; *Burt v. Ryne*, 48 Mo. 309; see also *Austin v. Bainter*, 50 Ill. 308; *Meeker v. Meeker*, 75 Ill. 260; *Kelly v. Kelly*, 126 Ill. 550.

¹⁰ *Williams v. Bishop*, 15 Ill. 555; *Rigg v. Wilton*, 13 Ill. 15; *Milk v. Moore*, 39 Ill. 588.

¹¹ *Dunn v. Dunn*, 11 Mich. 285;

An appeal or writ of error will not lie to set aside a verdict on feigned issues, until the chancery case is disposed of, and a joinder in error will be of no avail.¹

It would tend to promote justice, and aid the court in its decree, if the jury were instructed to find on each issue raised by the pleadings and proof, instead of finding a general verdict.²

The statute of Illinois provides that, "the court may, in its discretion, direct an issue or issues to be tried by a jury, whenever it shall be judged necessary in any cause in equity, pending therein. In all other causes in equity, the mode of trial shall be the same as has been heretofore practiced in courts of chancery."

Under this statute, it has been the practice to make an issue without using the common law forms of pleading. But the issue in chancery, if there be more than one, should be distinct and explicit, presenting in each a single question, so clearly that it could not but be understood by the jury, and their verdict should be responsive to each.³

No. 24. Order directing an issue of fact to be tried by a jury.

(Caption and title of cause.)

This cause came on to be heard upon the pleadings filed and the proofs taken therein, and the court having heard the arguments of the solicitors for the respective parties, it is *ordered* that the following issues of fact be made and tried at the ——— term of ——— court, to be held in the county of ———, or as soon thereafter as the same can be heard, to wit:

1. Was the deed of conveyance mentioned in the bill of complaint, to wit, etc., (*here describe the deed*) obtained by fraud of the defendant?

2. Was, etc. (*Here state any other fact to be tried by the jury, and so on.*)

The course of proceeding upon the trial of an issue is generally the same as that adopted in ordinary trials at law; except when the court of chancery has given some special directions upon the subject.⁴

Drawing up and settling.—Upon the granting of an order

Williard v. Magoon, 30 Mich. 278;
Waddams v. Humphrey, 22 Ill. 661.

¹ *Woodside v. Woodside*, 21 Ill. 207; *Brockett v. Brockett*, 3 How. U. S. R. 691

² *Von Glahn v. Von Glahn*, 46 Ill. 134.

³ *Milk v. Moore*, 39 Ill. 588.

⁴ Dan. Ch. Pr. 742; 1 Barb. Ch. Pr. 451.

for a feigned issue, a draft of the pleadings in an action of assumpsit is prepared by the complainant's solicitor, or by the solicitor of whichever party is ordered by the court to prepare it. In the declaration the pretended plaintiff declares that he laid a wager of a certain amount, with the defendant, on the questions in dispute; and avers that the fact is as he contended it was, and that he therefore brings his suit for the amount of the wager. The defendant by his plea admits the wager, but avers the contrary to be the fact. Whereupon the issue is joined, which is ordered to be tried.¹

Michigan practice.—Under the modern practice as it exists in Michigan, a resort to the old practice of ordering a feigned issue, will seldom be had. If it is considered desirable to form a feigned issue, instead of an issue of facts under the rule, forms of such orders, declarations and pleas, may be found in 2 Barbour's Chancery Practice, pp. 483-486, and 2 Chitty's Pleadings, p. 236.

¹ 1 Barb. Ch. Pr. 463; 2 Smith Ch. 80.

CHAPTER XIV.

HEARING.

Notice of hearing.—If either party has elected to have the testimony in a cause taken in open court, under the statute, and the cause is at issue as to all parties, the cause may thereafter be noticed for trial and hearing in open court by either party. Such notice may be countermanded in the same manner and with like effect as a notice of trial in an action at law.¹

At the expiration of the time for taking testimony where the same is taken before a commissioner, the testimony shall be considered closed without order, and either party may thereupon notice the cause for hearing at the next term of court. Such notice must be given at least ten days before the first day of the next term. But if the cause is not in readiness for hearing in time to so notice it, it may be noticed for a subsequent day, in term, not less than ten days after such notice, and placed at the foot of the calendar.²

When the cause is to be heard in open court, the case must be noticed for the first day in term, and can not be afterward.³

When there is no appearance of the defendant, after due proof of the service of process, the complainant may proceed *ex parte*, and the cause need not be noticed for hearing, or placed on the term calendar.⁴

If where the testimony is to be taken before a commissioner, the complainant fails to take any testimony within the time prescribed by the rules, the defendant may notice the cause for hearing on pleadings.

¹ Chan. Rule 14 b.

² Chan. Rule 14 h.

³ *Dunn v. Judge Superior Ct., Detroit*, 29 Mich. 228.

⁴ *Warner v. Juif*, 38 Mich. 662.

When the time has expired for answering amendments to a bill, the case can be noticed for hearing.¹

A notice for hearing for any time after the opening of term, but specifying no day, is irregular, and would not authorize an *ex parte* hearing; but the irregularity can be waived.²

How calendar to be made up.—Law Rule 18 provides that, previous to each term, the clerk shall prepare a calendar of causes for the term, which shall be made up in the following order: 1. Criminal cases. 2. Jury civil cases. 3. Non-jury civil cases. 4. Issues of law. 5. Chancery cases, including issue of law in such cases. Criminal cases shall have precedence. Jury and non-jury and chancery cases shall have precedence in the order of the respective dates of joining issue.

Section 6628 of How. Stat. provides, that the equity calendar at any regular term of the court shall not be taken up until the issues of fact upon the calendar have first been disposed of, unless by special order of the court.

No. 95. Notice of hearing.

STATE OF MICHIGAN.

In the Circuit Court for the County of ———. In Chancery.
(*Title of cause.*)

Please take notice, that this cause will be brought to a hearing on ———, before the circuit court for the county of ———, sitting in chancery, on the ——— day of ———, 18—, at the opening of the court on that day, or as soon thereafter as counsel can be heard.

Dated the ——— day of ——— A. D. 18—.

To C D,

Solicitor for defendant.

A B,

Solicitor for complainant.

Notes of issue.—Section 7552 How. Stat. provides that a note of issue shall be served on the clerk of the court, before such term thereof, as provided by rule.

Law Rule 16, which is made applicable to chancery causes,³ provides that the party noticing a cause for trial shall, at least twelve days before the first day of the term, file with the clerk a note of issue, giving the title of the cause, the name of the attorneys, the date of joining issue, and the cause of action. If a jury has been previously demanded, the same shall also

¹ *Munch v. Shabel*, 37 Mich. 167.

² Chan. Rule 15.

³ *Ibid.*

appear in the note of issue; provided, that, in the court's discretion, for cause shown, the court may, not later than the first day of the term, add to the term calendar a cause which has been regularly noticed for trial, although a note of issue was not filed.

No. 96. Note of issue.

STATE OF MICHIGAN.

In the Circuit Court for the County of _____. In Chancery.
 (Title of cause.) Action of _____.
 _____, Solicitor for Complainant. _____, Solicitor for Defendant.
 Issue joined _____, 19—.

To the register of said court: The above-entitled cause will be brought on for hearing at the next _____, 19—, term of said court.

You will please place said cause on the calendar for said term.

Dated _____, A. D. 19—. _____, Solicitor for Complainant.

Course of proceedings.—The party having the affirmative of the issues has the opening and closing of the case. Where the cause is heard upon the pleadings and proofs, the complainant opens. The order of proceeding is generally as follows: The complainant's bill is first read, or the substance of it briefly stated; the defendant's answer is then read or stated in like manner; after which the case and the matters in issue are stated with the points of equity arising therefrom; and then the testimony and such parts of the defendant's answer as are considered essential, are read by the complainant's solicitor. After the complainant's evidence has been read, the defendant's evidence is introduced; to which the complainant may offer rebutting testimony. The argument is then opened by the solicitor for the complainant. The defendant's solicitor is then heard in answer; to which the complainant's solicitor may reply, and concludes the argument.

On the hearing on bill, cross-bill, answers and depositions, both cases being heard together, and both parties having material allegations to sustain, the complainant in the original bill is entitled to the opening and the close.¹

In a bill filed to enjoin an action of ejectment and for specific performance, the complainant's counsel is entitled to the opening and closing.²

¹ *Murphy v. Stultz*, Saxton, 560.

² *Duman v. Pepper*, 43 Geo. 361.

When there are two defendants, who set up adverse claims, the course of practice is for the complainant to open; for the defendant who sets up a claim against the other then to go on, and for the other defendant to answer; and there is no reply between the defendants,¹ unless specially directed by the court.²

Upon a plea or demurrer, the defendant holds the affirmative, and opens the argument; and upon appeal, the opening argument of the appellant's counsel is first heard. Where the cause is heard upon exceptions to an answer, the complainant begins, if, upon exceptions to a master's report, the party excepting opens the argument. But where both parties except, the complainant's counsel is first heard upon his exceptions, and then the defendant's counsel answers him, and opens the argument upon his own exceptions.³

Hearing case out of its order.—Although it is a general rule that causes come on to be heard according as they stand upon the docket, yet they are sometimes heard out of their ordinary course, on sufficient cause being made to appear.⁴

Original and cross-bill heard together.—The original bill and cross-bill should be heard together.⁵ The court will also order depositions in a cross-suit to be read, on the account directed in the original suit, though the cross-bill is dismissed.⁶ And a cross-bill for discovery, taken *pro confesso*, will be ordered, on motion, to be read on the hearing of the original cause.⁷

In cross-suits and also in other suits, where there are two causes between the same parties, involving the same points in dispute, and where it is material that both causes should be heard together, if both are set down for hearing, but stand at a distance from each other, the court will permit the cause which stands last to be advanced, or that which stands first to be adjourned, so that both may come on at the same time; and likewise, if it is necessary, the depositions taken in one cause

¹ *Walton v. Van Mater*, Halst. Dig. 175.

² 1 Barb. Ch. Pr. 317.

³ 1 Barb. Ch. Pr. 317, 318.

⁴ *Gregg v. Brower*, 57 Ill. 525; *Clark v. Marfield*, 77 Ill. 258.

⁵ *Beauchamp v. Putnam*, 34 Ill. 378.

⁶ *Lubiere v. Genou*, 2 Ves. 579.

⁷ *Corey v. Gertaken*, 2 Mad. 4; 1 Barb. Ch. Pr. 320.

to be read in the other—an order for that purpose having been previously obtained.¹

It is in the discretion of the court to postpone the hearing on the original bill, until the cross-bill is ready for hearing, that both may be heard together; but this will not be done where there is unnecessary or affected delay in preparing the cross-bill.²

Effect of former orders on the hearing.—On a final hearing all previously rendered decretal orders are before the court, and may be altered, modified, or vacated, as justice may require.³

¹ *Nevil v. Johnson*, 2 Vern. 447; 360; *Beauchamp v. Putnam*, 34 Ill. 378.
Wilford v. Beaseley, 3 Atk. 501, 503; 378.
Prac. Reg. 172; 1 Barb. Ch. Pr. 320. ³ *Gibson v. Reese*, 50 Ill. 383.

² *McConnics v. Moseley*, 4 Call,

CHAPTER XV.

DECREES AND DECRETAL ORDERS.

Section 1. NATURE, USES AND KINDS OF DECREES.

2. FORMS OF DECREES.

SECTION I.

NATURE, USES AND KINDS OF DECREES.

A decree is the judgment or sentence of a court of equity, pronounced after the hearing or submission of the cause. It may be interlocutory or final. The former is properly an order or decree pronounced for the purpose of ascertaining matters of fact or law, preparatory to a final decree. It very seldom happens that the first decree can be final or conclude the cause. The latter settles the matter in dispute, and the final decree has the same effect as a judgment at law.¹

It is a settled rule, that a decree must conform to the allegations in the pleadings as well as to the proof in the cause;²

¹ 2 Mad. Ch. 462; *Barton's Suit* in Eq. 147.

² *Thayer v. Lane*, Walk. Ch. 200; *Jerome v. Hopkins*, 2 Mich. 96; *Cicotte v. Gagnier*, 2 Mich. 381; *Warner v. Whittaker*, 6 Mich. 133; *Bloomer v. Henderson*, 8 Mich. 395; *Bomier v. Caldwell*, 8 Mich. 463; *Barrows v. Baughman*, 9 Mich. 213; *Wurcherrer v. Hewitt*, 10 Mich. 453; *Peckham v. Buffam*, 11 Mich. 529; *Perkins v. Perkins*, 12 Mich. 456; *Moran v. Palmer*, 13 Mich. 367; *Converse v. Blumrich*, 14 Mich. 109; *Hubbard v. Winsor*, 15 Mich. 146; *Payne v. Avery*, 21 Mich. 524; *Fosdick v. Van Husan*, 21 Mich. 567; *Lebaron v. Shepherd*, 21 Mich. 263;

Curtis v. Goodenow, 24 Mich. 18; *Harwood v. Underwood*, 28 Mich. 427; *Dart v. Barbour*, 32 Mich. 267; *Jones v. Wells*, 31 Mich. 170; *Ford v. Loomis*, 33 Mich. 121; *Rudd v. Rudd*, *Ibid.* 101; *Smith v. Rumsey*, 33 Mich. 183; *Livingston v. Hayes*, 43 Mich. 129; *Woodworth v. Huntoon*, 40 Ill. 132; *Means v. Means*, 42 Ill. 50; *Hall v. Towne*, 45 Ill. 493; *Ins. Co. v. Slee*, 110 Ill. 36; *Jackson v. Miner*, 101 Ill. 550; *Gage v. Bailey*, 102 Ill. 11; *Kellogg v. Moore*, 97 Ill. 282; *Parkhurst v. Race*, 100 Ill. 558; *Pinneo v. Goodspeed*, 104 Ill. 186; *McMillan v. James*, 105 Ill. 194; *Johnson v. Johnson*, 114 Ill. 612; *Bremer v. Dock Co.*, 123 Ill. 104.

and a complainant can not obtain a decree for more than he has asked in his bill.¹

Interlocutory decree.—Judgment upon a demurrer in favor of the complainant, or against a plea, is not final but interlocutory;² for a decree is not final unless all the material facts are ascertained at the time; and a decree referring the cause to a master to ascertain such facts is interlocutory only;³ in like manner, whéré the further action of the court is necessary to give completely the relief contemplated by the court, there the decree upon which the question arises is to be regarded not as final but interlocutory.⁴

A decree deciding the rights of the parties as to the matter in controversy, and awarding costs, is still but interlocutory, if it be referred to commissioners to execute it; and the court has afterward to determine matters on the report;⁵ and a decree ordering an act to be done before the decree can be effectual, is interlocutory.⁶

Where money is directed to be paid into court, or property to be delivered to a receiver, or to a new trustee, or where anything is to be done, which may be the subject of exception or appeal, the decree is not final, but interlocutory only;⁷ and an order directing an issue at law, is interlocutory merely, and may be set aside at a subsequent term.⁸

A decree, in which the party in whose favor it is made can not obtain the benefit thereof without further hearing before the court, is interlocutory.⁹

Ordering bonds in dispute to be brought into court to await its further order, and that the several claimants interplead, is an interlocutory, not a final decree.¹⁰

¹ *Creasey v. St. George Society*, 34 Mich. 51; *Simons v. Guthrie*, 9 Cranch, 19; *Hall v. Towne*, 45 Ill. 493; *R. R. Co. v. Gay*, 7 Bradw. 404.

² *Bennett v. Nichols*, 12 Mich. 22; *Warner v. Tomlinson*, 1 Root, 201; *Gray v. Hays*, 7 Humph. 588; *Knapp v. Marshall*, 26 Ill. 63.

³ *Enos v. Sutherland*, 9 Mich. 148; *Caswell v. Comstock*, 6 Mich. 391; *Jaques v. M. E. Church*, 17 Johns. 548.

⁴ *Cocke v. Gilpin*, 1 Rob. Va. 20.

⁵ *Mackey v. Bell*, 2 Munf. 523; see also *Price v. Nesbit*, 1 Hill Ch. 445; *Perkins v. Perkins*, 10 Mich. 425.

⁶ *Hays v. Mays*, 1 J. J. Marsh. 497.

⁷ *Bellamy v. Bellamy*, 4 Florida, 242; *Colgate v. R. R. Co.*, 28 Mich. 288.

⁸ *Dabbs v. Dabbs*, 27 Ala. 646.

⁹ *Johnson v. Everett*, 9 Paige Ch. R. 636.

¹⁰ *Thomas v. County of Morgan*, 39 Ill. 497.

An order dissolving an injunction is not a final decree;¹ neither is an order that allows temporary alimony.² An order granting leave to file a bill of review is not a final order, but an order denying leave is.³

An interlocutory decree is no evidence as to anything on the merits.⁴

Final decree.—A decree which finally disposes of the subject of litigation, so far as the court is concerned, reserving no further questions or directions for the future judgment of the court, is a final decree, though some further proceedings are to be had before a master, exceptions to whose report may bring the matter again before the court,⁵ such as the appointment of a commissioner to sell a part of the subject of controversy, and account for and pay the proceeds to the parties, with liberty to them to apply to the court to add other, or substitute new commissioners, or for a partition of the subject directed to be sold in kind,⁶ or a reference to a master to ascertain the amount of the debt.⁷ A decree of foreclosure and sale of the premises, in a bill to foreclose a mortgage, is a final decree. And a sale under the decree, after the death of a defendant, without a revival of the suit, is not an error for which the decree will be reversed on a bill of review.⁸

A decree that the defendants should assign a certificate of lands to the complainant, provided he should, before a given

¹ *Boinay v. Coats*, 17 Mich. 411; *Spencer v. Stearns*, 28 Mich. 463; *Wing v. Warner*, 2 Doug. Mich. 288.

² *Cooper v. Mayhew*, 40 Mich. 528; *Hunter v. Hunter*, 100 Ill. 519.

³ *Maxfield v. Freeman*, 39 Mich. 64; *Johnson v. Shepherd*, 35 Mich. 115; *Scriven v. Hursh*, 39 Mich. 98; see also *Reed v. Baker*, 42 Mich. 272.

⁴ *R. R. Co. v. Chesebro*, 74 Mich. 466.

⁵ *Mills v. Hoag*, 7 Paige Ch. R. 18; *Vanmeter v. Vanmeter*, 3 Gratt. Va. 148; *Dickenson v. Codwise*, 11 Paige Ch. R. 189; see *Bates v. Delavan*, 5 Paige Ch. R. 299; *Tennent*

v. Patton, 6 Leigh, 196; *Wetherford v. James*, 2 Ala. 170; *Cook v. Bay*, 4 How. Miss. 485; *Talbot v. Todd*, 7 J. J. Marsh. 456; *Graham v. Elmore*, Harring. Ch. 265; *Damouth v. Klock*, 28 Mich. 163; *Lewis v. Campau*, 14 Mich. 458.

⁶ *Harvey v. Branson*, 1 Leigh, 108; *Larue v. Larue*, 2 Little, 261; *Field v. Ross*, 1 Monroe, 137.

⁷ *Damouth v. Klock*, 28 Mich. 163; *Johnson v. Everett*, 9 Paige Ch. 636.

⁸ *Whiting v. Bank of U. S.*, 13 Pet. 6; see *Travis v. Waters*, 1 Johns. Ch. 85; *Jonit v. Gaither*, 6 Monr. 251; see *Benedict v. Thompson*, 2 Doug. Mich. 299.

day, and after the tender of the assignment, pay a certain sum of money to them, is a final decree.¹

An order striking a bill from the files, is a final order;² so is an order fining a party for contempt;³ or an order refusing to set aside a decree for irregularity.⁴

Whether an adjudication in a chancery suit is merely an interlocutory order or a decree, is better tested by its effect upon the rights and interests of the parties than by the stage of the cause upon which it is made; and whenever an order of a court of chancery directs a legal right, it is in its nature final.⁵

Where a claim in the original bill becomes unimportant before decree, and the decree does not pass upon it, but disposes of all other matters in the suit, the decree is final;⁶ and a decree appointing a trustee to sue under a deed of trust, is final as to this matter, and binding alike on strangers and on parties to the decree.⁷

If a suit is dismissed by the court on a final hearing, it is a bar to another suit; but not if the ground of dismissal is that a court of law is the proper forum.⁸

An order is final which enjoins the defendant from ever using a particular device upon his manufactures, or from selling them as if made at the complainant's establishment.

Where a preliminary injunction operates to give all the aid prayed for in the bill, the order of allowance has all the effect of a final decree, and may be appealed from.⁹

SECTION II.

FORMS OF DECREES.

Constituent parts.—Decrees in general consist of three parts: *first*, the caption and title; *second*, the recitals; and

¹ *Turner v. Crebill*, 1 Ham. 368.

² *Ruff v. Starke*, 3 Gratt. Va. 134.

³ *Griffin v. Doe*, 12 Ala. 783.

⁴ *Swift v. Allen*, 55 Ill. 303; *Knapp v. Marshall*, 26 Ill. 63.

⁵ *Webster v. Hitchcock*, 11 Mich. 56.

⁶ *Romyn v. Caplis*, 17 Mich. 449.

⁷ *Mich. Ins. Co. v. Whittemore*, 12 Mich. 311.

⁸ *Barry v. Briggs*, 22 Mich. 201.

⁹ *Ry. Co. v. R. R. Co.*, 61 Mich. 9. *Smith v. Walker*, 57 Mich. 456, 458; see *Witbeck v. Chittenden*, 50 Mich. 426; *Morey v. Grant*, 48 Mich. 326; *Simon v. Schloss*, 48 Mich. 233;

third, the ordering part, to which may sometimes be added the *fourth*, the declaratory part, which, when made use of, generally precedes the ordering part.¹

The caption and title.—The decree commences with the name of the court, and the place where it is held, the date at which it is pronounced, and the title of the cause.

No. 97. Caption of decree or order in circuit court.

STATE OF MICHIGAN.

The Circuit Court for the County of ——. In Chancery.

A B,
Complainant,
vs.
C D,
Defendant.

At a session of said court held at the court house in the — of —, in said county, on the — day of —, A. D. 18—.

Present, Hon. —, Circuit Judge.

No. 98. Caption of order by commissioner.

STATE OF MICHIGAN.

— Judicial Circuit. In Chancery.

A B,
Complainant,
vs.
C D,
Defendant.

Suit pending in the Circuit Court for the county of —, in chancery, at — on the —, day of —, A. D. 18—.

The recitals.—The practice in England at one time, was to recite at length the pleadings and evidence in the cause; but this practice, in consequence of its expense and inconvenience, has been abolished, and the decree now merely recites the substance of the pleadings, and the facts on which the court found its judgment. In this country, the decree usually contains a mere reference to the antecedent pleadings, without embodying them, or any special facts upon which it is rendered.² In Illinois, however, the evidence is frequently preserved in the decree.³ But it is not necessary, that the

Towas, etc., R. Co. v. Iosco Circuit Judge, 44 Mich. 479; *Arnold v. Bright*, 41 Mich. 207; *Taylor v. Swett*, 40 Mich. 736; *McCombs v. Merryhew*, *Id.* 721; *Shepherd v. Rice*, 38 Mich. 556; *Damouth v. Klock*, 28 Mich. 163; *Barry v. Briggs*, 22 Mich. 201; *Kingsbury v. Kingsbury*, 20

Mich. 214; *Lewis v. Campau*, 14 Mich. 458.

¹ Barton's Suit in Eq. 150; 1 Barb. Ch. Pr., 337; 2 Dan. Ch. Pr. 663.

² Barton's Suit in Eq. 150; see *Quarrier v. Carter*, 4 Hen. & Munf. 242.

³ *Cooley v. Scarlett*, 38 Ill. 316;

evidence of the facts should be preserved in the decree, although not otherwise preserved; it is sufficient if the facts established by the evidence are recited in the decree.¹

Where a decree in chancery recites that the case was heard upon proofs, and then finds the facts charged in the bill to be true, it will be inferred the facts were found upon the testimony. Such a decree will be sustained, though it does not purport to set out the testimony, and it is not otherwise preserved in the record.² The facts when found in a decree must correspond with the allegations of the parties in the pleadings.³

No. 99. Recital of a decree or order.

This cause having come on to be heard upon the bill of complaint herein, the answer thereto, the replication of the complainant to such answer, and the proofs taken in said cause, and having been argued by counsel for the respective parties, and the court having duly considered the same, it is ordered, etc.

The 86th rule for practice in the United States courts of equity, provides that, "in drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding shall be recited or stated in the decree or order," but the decree and order shall begin, in substance, as follows:

"This cause came on to be heard (or to be further heard, as the case may be), and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed, as follows, viz.: (*Here insert the decree or order.*)"

The ordering part.—After the recitals come the ordering or mandatory part of the decree, containing the specific directions of the court upon the matter before it, which, it is obvious, must depend upon the nature of the particular case which is its subject.⁴

Where the decree is merely interlocutory, and directs an issue or an inquiry to be made, or account to be taken before a master, it usually contains a reservation of the further mat-

Walker v. Carey, 53 Ill. 470; *Marvin v. Collins*, 98 Ill. 510; *Gage v. Busse*, 7 Bradw. 433; *Parkhurst v. Race*, 100 Ill. 558.

¹ *Allen v. LeMoyne*, 102 Ill. 25.

² *Mauck v. Mauck*, 54 Ill. 281; *Jones*

v. Neely, 72 Ill. 449; *Wright v. Troutman*, 81 Ill. 374; *Rhoades v. Rhoades*, 18 Ill. 139; *Binkert v. Wabash Ry. Co.*, 98 Ill. 205.

³ *Parkhurst v. Race*, 100 Ill. 558.

⁴ *Barton's Suit in Eq.* 15.

ters to be decided, and generally, also, the costs of the suit, till after the event of the issue or reference shall be known.¹

Declaratory part.—Where the suit seeks a declaration of the rights of the parties, the ordering part of the decree should be prefaced by such declaration. This is not, however, absolutely necessary, and its omission will not invalidate the decree.² Sometimes the court directs an insertion in the decree of the reasons for making the declaration, and of the grounds upon which it proceeds in making it.³ This, however, is not often done, though the utility of the practice has been frequently recognized.⁴

Decree by consent.—When a decree is rendered by consent it should be so stated in the decree.⁵ Sometimes it is stated to be by consent generally; sometimes by consent of counsel, and sometimes by the consent of the parties.⁶

A decree or order made by consent can not be set aside by rehearing, writ of error or an appeal, or a bill of review,⁷ without showing by the bill of review fraud or mistake.⁸ And the consent may be proved *aliunde*.⁹

Orders and decrees made by consent, and with full knowledge of the facts, are binding upon the parties consenting, and can not be disregarded as long as they remain in force.¹⁰

Nunc pro tunc clause.—Decrees will sometimes be entered *nunc pro tunc*.¹¹

When they are so entered the following recital and direction may be inserted :

¹ 1 Barb. Ch. Pr. 338.

² *Jenour v. Jenour*, 10 Ves. 568; 1 Barb. Ch. Pr. 339.

³ *Gorden v. Gorden*, 3 Swanst. 478; *Maynard v. Mosely*, Id. 653; *Onions v. Tyrer*, 1 P. Wms. 343.

⁴ *Bax v. Whitbread*, 16 Ves. 24; *Gorden v. Gorden*, 3 Swanst. 478; 1 Barb. Ch. Pr. 339.

⁵ *Barton's Suit in Eq.* 150, 151; 1 Barb. Ch. Pr. 339; *Seaton on Decrees*, 374; *Bank v. Daboll*, 100 Mich. 67.

⁶ *Seaton on Decrees*, 374.

⁷ *Id.*; *Bradish v. Gee*, Ambl. 229; *Harrison v. Rumsey*, 2 Ves. 483; *Toder v. Sansam*, 7 Bro. P. C. 244;

Norcott v. Norcott, 7 Vin. 398; *Windham v. Windham*, Freem. 127.

⁸ *Fragler v. Crow*, 40 Ill. 415.

⁹ *Armstrong v. Cooper*, 11 Ill. 540.

¹⁰ *Russell v. White*, 63 Mich. 409; *Knobloch v. Mueller*, 123 Ill. 565; *Thompson v. Maxwell*, 95 U. S. 391; *Haas v. Chicago Building Society*, 80 Ill. 248; *Winchester v. Winchester*, 121 Mass. 127.

¹¹ *Stevens v. Coffeen*, 39 Ill. 148; *McCormick v. Wheeler*, 36 Ill. 115; *McLain v. Van Winkle*, 46 Ill. 407; *Frame v. Frame*, 16 Ill. 155; *Brignardello v. Gray*, 1 Wall. U. S. R. 630.

“ And it appearing to the satisfaction of this court that the complainant, A B (or the defendant C D), has departed this life since the argument of this cause, it is further ordered, that this decree be entered *nunc pro tunc*, as of the —— day of ——, 18—, the day when this cause was argued.”¹

When one of the defendants dies after the argument of a cause, and before it is decided, it is customary to enter the decree *nunc pro tunc*, so that it may have relation back as of the day of the final hearing.²

So where the complainant died after the entry of an appeal from the decree of a vice chancellor, and after the cause was ready for a hearing upon the appeal, but the fact of his death being unknown to the counsel, the cause was afterward heard and decided by the chancellor, upon the appeal, it was held that the decree upon the appeal might be entered *nunc pro tunc*, as of a day previous to the death of the complainant and after the entering of the appeal.³

So where the *cestui que trust* of the complainant had died after argument and before the decision of the cause by which the suit was determined, the court ordered the decree to be entered *nunc pro tunc*, as of the time of the argument.⁴

And decrees have been entered *nunc pro tunc*, after a very long interval has elapsed from the time of pronouncing the decree; and even where the original decree has been lost, the court has permitted it to be entered *nunc pro tunc* from the office copy, after the lapse of twenty-three years.⁵

A decree can not be entered in a divorce suit, so as to relate back to a period before the death of a party.⁶

Drawing of decree.—The decree should be written out by the solicitor and submitted to the opposite side, and unless it is an order to which a party is entitled of course, it should be signed by the court.

Common and special orders and rules.—Every rule to which a party would, according to the practice of the court, be entitled of course, without showing special cause, is denom-

¹ 1 Barb. Ch. Pr. 340.

² *Campbell v. Mesier*, 4 Johns. Ch. 334.

³ *Vroom v. Ditmas*, 5 Paige Ch. 528.

⁴ *Wood v. Keyes*, 6 Paige Ch. R. 478.

⁵ *Lawrence v. Richmond*, 1 Jac. & W. 241; *Donne v. Lewis*, 11 Ves. 601; *Jesson v. Brewer*, 1 Dick. 371; 1 Barb. Ch. Pr. 341, 342.

⁶ *Wilson v. Wilson*, 73 Mich. 620.

inated a common rule; and every other rule is denominated a special rule. All common rules and all rules by consent of parties shall be entered with the clerk at his office, in a book to be provided by him for that purpose, to be called "common rule book" and may be entered at any time, as well in vacation as during term; and the day when the rule shall be entered shall be noted therein, and the party may enter such rule as he may conceive himself to be entitled to of course, but at his peril. Except as required by statutes, such rules may be filed with the clerk with the like effect as if entered as above provided. All orders made by the direction of the court shall be entered in the record of the proceedings of the court, and all orders made by the judge at chambers, shall be signed by the judge and filed in the cause.¹

A rule entered by consent, without fraud or misrepresentation, will not be vacated.²

Of course, a common order need not be signed by the court.

A decree is inoperative as a decree, until it has received the file-mark of the clerk. Where a decree was prepared by the judge before the expiration of his term of office, but was not filed until after his successor had been elected and qualified, it was held to be a nullity, as a judicial act can only be performed by one who was a judge at the time the act was done.³

But by statute in Michigan, upon failure of a judge to sign a decree, it may be signed by his successor.⁴ So a court, when the decree is duly signed, but has not been recorded, may order it recorded and enrolled *nunc pro tunc*.⁵

If two or more motions or applications are decided at the same time or day, unless otherwise ordered by the court, the whole may be entered in one order. And a party entitled to enter two or more orders of course, in a suit, on the same day, or at the same time, they shall be entered as one order.

No. 100. General form of an order.

(Caption with title of the cause, as in 97.)

This cause having come on to be heard upon the motion of the complain-

¹ Chan. Rule 15; Law Rule 11.

⁴ Comp. L. 1871, § 5687; How. St.

² *Hammond v. Place*, Har. Ch. § 7255.
438.

⁵ *Ibid.*, § 5088; How. St. § 7256.

³ *Russell v. Sargent*, 7 Bradw. 98.

ant, (or defendant) for, etc. (*here insert the nature of the motion, and let the recital agree with the facts*), the bill of complaint herein, the answer of the defendant thereto, the replication of the complainant to such answer, and the proofs taken in the cause, and having been argued by counsel for the respective parties;

Now, therefore, on consideration thereof, it is ordered, adjudged and decreed, and the court doth hereby order, adjudge and decree as follows, viz.* (*Here insert the order.*)

No. 101. General form of a decree.

(*Caption with title of the cause, as in No. 97.*)

This cause having come on to be heard upon the bill of complaint herein, the answer of the defendant thereto, the replication of the complainant to such answer, and the proofs, oral, documentary and written, taken and filed in said cause, and having been argued by counsel for the respective parties;

Now, therefore, on consideration thereof, it is ordered, adjudged and decreed, and the court doth hereby order, adjudge and decree as follows, viz.: (*Here insert the decree.*)

No. 102. General form of a decree or order.

(*Caption with title of cause, as in No. 97.*)

This cause came on to be heard, (or to be further heard, *as the case may be*), at this term of the said court, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed, as follows, viz.: (*Here insert the decree or order.*)

Money decrees.—A court of equity has no general jurisdiction to grant money decrees.¹

Enrollment of decree.—Sections 6648 and 6649 of Howell's Statutes provide for the enrollment of decrees and proceedings in a cause.² From these sections it is clear that the request to the register to enroll the decree and proceedings does not have the effect of enrollment. It is not until the papers are attached together, and the required certificate of the register, under the seal of the court, annexed, and filed in his office, that the decree and proceedings are deemed to be enrolled.³

Chancery Rule 24 provides that no process shall be issued or other proceeding had on any final decree, to enforce the

¹ *Kinter v. Pickard*, 67 Mich. 125.

² See also How. St. §§ 6650-7256; Laws 1895, p. 217; *Benedict v. Thompson*, Walk. Ch. 447; *Barnes*

v. Kent, 97 Mich. 212; *Benedict v. Auditor*, 104 Mich. 269.

³ *Low v. Mills*, 61 Mich. 35.

same, until the same is duly enrolled pursuant to the statute. The register should include in such enrollment all papers filed in the cause.¹

If the decree authorizes the sale of real estate, notice of such sale may be given in advance of such enrollment, but no conveyance shall be executed on such sale until such enrollment is had.²

¹ See § 6648, How. St.

² Chan. Rule 24.

CHAPTER XVI.

MOTIONS AND AFFIDAVITS.

- Section 1. MOTIONS.
2. SERVICE OF PAPERS.
3. AFFIDAVITS.

SECTION I.

MOTIONS.

Motions are of course or special. Motions of course require no notice, and are usually those upon which orders of course are entered by the register without actual application to the court. A special motion is one, not granted of course, but which is founded upon the pleadings, upon affidavits, or upon some previous order of the court. A motion is an application to the court made *ore tenus*.

Some special motions are made *ex parte*, as an application for a guardian *ad litem*, for an order to show cause why an injunction should not issue, or for the appointment of a next friend.

Law Rule 19 provides that all petitions and special motions (except motions for continuance and motions to strike cause from calendar) must be in writing, and be signed by the solicitor of the party in whose behalf the same are entered.

They should set out briefly, but distinctly, the grounds upon which they are founded, and with the affidavits supporting the same, must be filed in the office of the clerk of the court on or before the day on which they are noticed for argument.¹

Notice.—When a party has appeared, notice of every application in the court should be given him, relating to the cause.²

Notice of the argument of motions and petitions (except

¹ Chan. Rule 15.

Hinchman, 41 Mich. 716; *Munch v.*

² How. Stat. § 6636; *Jenny v. Shabel*, 37 Mich. 170.

O'Flynn, 5 Mich. 215; *Watson v.*

motions for continuance and motions to strike causes from calendar), together with a copy thereof, and of the affidavits on which they are based, must be served on the opposite attorney at least four days before the time noticed for hearing the same; but for good cause shown the court may hear such argument on shorter notice.¹

When argued.—Motions and petitions must be argued on the day for which they are noticed, if the party has an opportunity to be heard on that day, unless the court or commissioner shall otherwise direct. If there is not sufficient time to finish the business noticed for any day, it may be continued from day to day until it is completed; or it may be adjourned to some subsequent day. And motions and petitions which can not be heard on the day for which they are noticed, will, in the absence of special order, stand continued from day to day without any special continuance.²

Not more than one counsel on each side will be heard on the argument of any petition or motion, the mover being entitled to open the argument, and to reply to the argument of the opposite counsel.³

Stay of proceedings.—Whenever a stay of proceedings may be necessary in order to make a special motion, the judge may grant an order for that purpose; and service of such order, with copies of the affidavits on which it is grounded, and the notice of the motion, shall operate as a stay of proceedings until the order of the court is had in the premises, unless the judge shall in the meantime supersede or set aside such order. But the proceedings will not be stayed for a longer time than to enable the party to make his motion according to the practice of the court, and if made, until the decision of the court thereon.⁴

Motion for continuance.—No motion for the continuance of a cause made after the first day in term, will be heard, unless a sufficient excuse is shown for the delay; and on a second application by a party for the continuance of a cause, the party so applying shall state, in addition to the usual requisites, the facts which he expects to prove by the absent

¹ Chan. Rule 15; Law Rule 19.

² Law Rule 19.

³ Law Rule 19.

⁴ Law Rule 20. See How. St. Supt. 7621 c.

witness, and shall also state with particularity the diligence he has used to procure his attendance. In case it is admitted by the opposite party in a civil cause, that the witness named would, if placed upon the stand, testify as stated in such affidavit, the motion for a continuance shall be denied; unless the court, for the furtherance of justice, shall deem a continuance necessary.¹

The granting of a motion for continuance is a matter within the discretion of the trial court.²

If the party receiving notice of trial, shall serve a notice on the opposite party that he will move for a continuance of the cause at the term for which it is noticed, together with copy of the affidavits upon which he intends to found the motion, he will not be liable to such party for any costs of preparing to try the cause, accruing after the service of such notice and affidavits, in case a continuance is granted on the papers so served, excepting such as may be unavoidable.³

When a continuance is granted upon payment of costs, such costs may be taxed, summarily, by the court, and on being taxed, must be paid on demand of the party, his agent or attorney; and if not so paid, on affidavit of the fact, such continuance may be vacated, or the court may grant an attachment therefor, with the accruing costs.⁴

Counter affidavits may be read in opposition to a motion without having been previously served.⁵

Applications by petition must be noticed and served the same as motions.

No. 103. Form of notice of special motion.

(Title of court and cause.)

To J F A,

Solicitor for defendant.

Sir: You will please take notice that upon ———, the ——— day of ———, A. D. 18—, at the opening of court on said day, or as soon thereafter as counsel can be heard, I shall move said court for an order for alimony and expenses in said cause, pending the litigation. Said motion will be founded upon the pleadings in said cause now on file in said court, and the petition of A B, the complainant, this day filed in said cause, with a true

¹ Law Rule 22.

² *Bussey v. Bussey*, 71 Mich. 504;
Winkelmair v. Daiber, 92 Mich. 621.

³ Law Rule 22.

⁴ Law Rule 22.

⁵ *Lathrop v. Hicks*, 2 Doug. 223.

copy of which you are herewith served, and upon the affidavit of H C B, this day filed in said court, with a true copy of which you are also herewith served.

Dated, etc.

F R S,
Solicitor for complainant.

Motion or petition for rehearing.—A petition for a rehearing shall state the special matter or cause on which such rehearing is applied for, and the particular points in which the decree or order is alleged to be erroneous, but it shall not be necessary to state the proceedings anterior to such decree or order sought to be reversed; and the facts, if they do not appear upon the records of the court, shall be verified by the affidavit of the party, or of some other person. It shall also be accompanied by the certificate of two counsel that they have examined the case, and that in their opinion the decree or order is erroneous in the particulars mentioned in the petition. And a copy of the petition, with the usual notice of presenting the same, shall be served upon the adverse party, but the rehearing shall not be considered as a matter of course in any case.¹

A rehearing may be granted after the time for taking an appeal has expired.²

As to the grounds for granting a rehearing, see the cases noted below.³

The court may correct a mistake in its decree, either upon motion or petition.⁴

If a rehearing is granted, the petitioner will lose the benefit thereof, unless he shall, within ten days thereafter, deposit with the register fifty dollars, to answer the costs and damages of the adverse party, if the decree or order shall not be materially varied.⁵

¹ Chan. Rule 25a.

² *Barnes v. Kent, etc.*, 97 Mich. 213.

³ *Hodges v. McDuff*, 76 Mich. 303;
Bope v. Ferris, 77 Mich. 304; *Sherwood v. Bank*, 104 Mich. 63.

⁴ *Bates v. Garrison*, Har. Ch. 221;
Jerome v. Seymour, Walk. Ch. 359.

⁵ Chan. Rule 25 b.

SECTION II.

SERVICE OF PAPERS.

When the solicitor for the adverse party resides or has his office in the same city, village or township as the solicitor making the service, papers are required by the rules to be served as follows, viz.:

(a) By delivering the same to the solicitor personally.

(b) Or, by leaving the same in his office with his clerk, or with a person having charge thereof.

(c) Or, when no person is to be found in his office, by leaving the same, between the hours of six in the morning and nine in the evening, in some suitable and conspicuous place in such office.

(d) Or, if the office be not open, so as to admit of service therein, then by leaving the same at the residence of the solicitor with some person of suitable age and discretion.

(e) Or, by depositing the same in the postoffice of the city, village or township, inclosed in an envelope plainly addressed to such solicitor, with postage fully prepaid.¹

By mail.—Where the solicitor resides, or has his office, in a different city, village or township, than the solicitor making the service, papers may be served in the manner above provided, or, by depositing the same in some postoffice directed to the solicitor at his business address, with postage fully prepaid; such address to be ascertained according to the best information and belief of the person making the service; and in such case, the time of service must be increased one day for every one hundred miles distance, or fraction thereof, between the place of deposit and the place of address.²

The usual course of travel governs the distance.³

Where several defendants or solicitors.—In cases where there are two or more defendants, who appear by different solicitors, service of all papers in behalf of the complainant shall be made on the solicitor for each of the other defendants, and in such case service of all papers in behalf of any defendant shall be made on the solicitor for each of the other

¹ Law Rule 28; Chan. Rule 15.

² Law Rule 29; Chan. Rule 15.

³ *Raymond v. Hinckson*, 15 Mich. 516.

defendants and upon the solicitor for the complainant. In case two or more solicitors appear for the same party or parties, service on any one of said attorneys, whether they be partners or not, shall be sufficient.¹

On party prosecuting or defending in person.—When a party prosecutes or defends his cause in person, service of papers may be made on him in the manner hereinbefore provided for service on solicitors, whether such person be a licensed attorney or not.²

In exceptional cases.—In all cases where service of papers can not reasonably be made on account of the lack of a solicitor of record, or the inability to find a party, or for any other reason, the court in which such cause is pending, or judge thereof at chambers, upon an *ex parte* application, on cause shown, may direct in what manner and on whom service may be had, and on whom service may be made.³

When service required.—No service of papers is necessary on a defendant who has not regularly appeared, except as specially required by rule or statute. But a defendant who has appeared by notice of retainer or appearance will be entitled to notice in advance of all future proceedings in the cause, although he may not have followed his appearance by plea or demurrer.⁴

How time computed.—The day on which any rule shall be entered, or order, notice, pleading or paper served, should be excluded in the computation of the time for complying with the exigency of such rule, order or notice, pleading or paper, and the day on which a compliance therewith is required should be included, except where it falls on Sunday, in which case the party has the next day to comply therewith.

When by the terms of any order, an act is directed to be performed instanter, it must be done within twenty-four hours.⁵

Where an act is required by statute to be done within any number of days less than a week, Sunday is excluded.⁶

¹ Law Rule 30; Chan. Rule 15.

² Law Rule 31; Chan. Rule 15.

³ Law Rule 32; Chan. Rule 15.

⁴ Law Rule 35; Chan. Rule 15.

⁵ Law Rule 36; Chan. Rule 15;

Anderson v. Baughman, 6 Mich. 297; *Gantz v. Tules*, 49 Mich. 728; *Chaddock v. Berry*, 93 Mich. 543.

⁶ *Campfield v. Cook*, 92 Mich. 626.

Intervening Sundays are included in computing time for serving notices of hearing and notices of motions.¹

SECTION III.

AFFIDAVITS.

An affidavit to be used in a case should be entitled in the court and cause, or it can not be used.² But where it is attached to a paper properly entitled and refers to it, the affidavit will be deemed to adopt the title by reference.³ An affidavit must be entitled with the names of all the parties to the suit.⁴ The complainant's name must be placed first,⁵ and where there are several defendants, it is sufficient if the affidavit states the name of the first defendant and "others" without setting forth all their names at length.

The venue, which is the county in which the affidavit is sworn, to wit, "— county, ss." is an essential part of the affidavit.⁶ The words "before me," should appear in the jurat.⁷ The affidavit must first be entitled in the court and cause, then follows the venue, then the stating part, next the signature of the deponent, then the jurat.

No. 104. Form of jurat to affidavit.

Subscribed and sworn to before me, this — day — of —, A. D. 18—.

O H L.

Notary Public — Co., Mich.

An affidavit can not be sworn to before the solicitor of record of either of the parties.⁸

The oath administered is "you do solemnly swear that the contents of this affidavit by you subscribed are true, so help you God."

The affidavit may be sworn to before any justice, judge or

¹ *Anderson v. Baughman*, 6 Mich. 297; *Carey v. Hilliker*, 15 Mich. 314.

² *Whipple v. Williams*, 1 Mich. 115.

³ *King v. Harrington*, 14 Mich. 532; *Beebe v. Morrell*, 76 Mich. 118.

⁴ *Arnold v. Nye*, 11 Mich. 456.

⁵ Law Rule 37; Chan. Rule 15.

⁶ *Cook v. Staats*, 18 Barb. 407; *Lane v. Moss*, 6 How. 394; Wait's Law and Practice, 147.

⁷ *Smart v. Hone*, 3 Mich. 490.

⁸ How. Stat. § 637; *Snyder v. Hemingway*, 47 Mich. 549; *Bradley v. Anderson*, 50 Mich. 100.

clerk of any court of record, circuit court commissioner, notary public, or justice of the peace or any register.¹

In cases where by law the affidavit of any person residing in another state of the United States, or in any foreign country is required, or may be received in judicial proceedings in this state, to entitle the same to be read, it must be authenticated as follows:

First. It must be certified by some judge of a court having a seal, to have been taken and subscribed before him, specifying the time and place where taken.

Second. The genuineness of the signature of such judge, the existence of the court, and the fact that such judge is a member thereof, must be certified by the clerk of the court, under the seal thereof; or,

Third. If such affidavit be taken in any other of the United States, or any territory thereof, it may be taken before a commissioner duly appointed and commissioned by the governor of this state to take affidavits therein, or before any notary public or justice of the peace authorized by the laws of such state to administer oaths therein. The signature of such notary public or justice of the peace, and the fact that at the time of the taking of such affidavit, the person before whom the same was taken was such notary public or justice of the peace, must be certified by the clerk of any court of record in the county where such affidavit shall be taken, under the seal of the court.²

For form of jurat to bill of complaint or petition, see page 40.

No. 105. Jurat to bill, sworn to by solicitor.

STATE OF MICHIGAN, }
County of ———. } ss.

On this ——— day of ———, A. D. 18—, before me personally appeared H C B, and made oath that he is the agent and solicitor for——, the complainant in the foregoing bill of complaint, for the purpose of filing said bill and commencing and prosecuting said cause; that he has read said bill of complaint and knows the contents of the same; that he has information as to all the matters stated in said bill, and from such information believes such matters to be truly stated therein, and that such bill is true; that all mat-

¹How. Stat. §§ 7541, 7542; see
Bloomington v. Chittenden, 75
Mich. 305.

²How. Stat. § 7448.

ters in said bill stated positively and not on information and belief, are true, to his knowledge, and that all matters therein stated to be upon information and belief, he is informed and believes are true, and that the complainant is not now in this state, but is now in the State of New York.

L N B,
Notary Public, — County, Mich.

Formal requisites of an affidavit.—The formal requisites of an affidavit are the title, venue, signature, jurat and authentication.

The general rule is that an affidavit must be entitled in the suit in which it is to be used, and if it is entitled in a non-pending suit it is a nullity. The inquiry in such cases is, has the affidavit been fully identified as having been filed in that cause; and if so, the want of the formality of a title is of no consequence since the title is for the purpose of identifying the suit in which the affidavit is designed to be used.¹

It was held in 41 Eng. Law and Eq. 214, that perjury would lie although the affidavit was not entitled in all the names of the defendants.² And in 2 Eng. Law and Eq. 236, it was held that the title need not have been written upon the affidavit when made, if it be shown that it was made for the purposes of the suit in which it was filed, and for no other purpose.³

The office of an affidavit in many cases is to confer jurisdiction; and, if that is sufficient, the court will in such instances obtain jurisdiction over the process.⁴

Affidavit should state facts positively.—An affidavit for a civil warrant, which does not state the facts authorizing the issuance of the warrant positively, and fails to give the circumstances upon which affiant has good reason to believe they exist, will not give a court jurisdiction of a case.⁵

¹ *Beebe v. Morrell*, 76 Mich. 114.

² 1 Russ. Crimes, 668.

³ *Ib.*, 119; see *Elliott v. Whitmore*, 5 Mich. 537.

⁴ *Bloomingtondale v. Chittenden*, 75 Mich. 305; see *People v. Simonson*, 25 Mich. 113; *Merrick v. Mayhew*, 40 Mich. 199, 200.

⁵ *Luton v. Circuit Judge*, 70 Mich. 152; see the form of affidavit in this case, page 153; also, see *Hatch v. Saunders*, 66 Mich. 181, and a form of an affidavit for a *capias ad respondendum* in that case.

CHAPTER XVII.

SUPPLEMENTAL BILL.

Section 1. NATURE OF, AND WHEN PROPER.

2. WHEN TO BE FILED.
3. PARTIES TO.
4. FORM OF.
5. PETITION FOR LEAVE TO FILE.
6. PROCESS.
7. DEFENSES TO.
8. REPLICATION AND EVIDENCE.
9. HEARING.

SECTION I.

NATURE OF, AND WHEN PROPER.

A supplemental bill is used for the purpose of supplying some irregularity or defect discovered in the frame of the original bill, or in some proceedings upon it; or some defect in the suit arising from events happening after an issue had been reached in the proceedings, and by which persons, not parties to the suit, have acquired an interest in it.¹ If, however, the original bill shows no ground for relief, the defect can not be cured by a supplemental bill, setting up matters that have arisen since the commencement of the suit.²

Matters which occurred prior to the filing of the original bill, and not stated therein, should be brought into the suit by amendment, but matters arising subsequent to the filing of the original bill, should be introduced by a supplemental bill.³ And such bill may not only be for the purpose of putting in

¹ Barton's Suit in Eq. 128; Story's Eq. Pl. § 332; Mont. Eq. Pl. 316; Hinde's Pr. 42, 45.

² *Fahs v. Roberts*, 54 Ill. 192; *Candler v. Pettit*, 1 Paige Ch. R. 168; *Brown v. Higdon*, 1 Atk. 291; *Edgar v. Clevenger*, 2 Green Ch.

R. 238; Story's Eq. Pl. § 339; *Hughes v. Carne*, 135 Ill. 519; *Miller v. Cook*, 135 Ill. 190.

³ *Graves v. Niles*, Har. Ch. 332; *Hammond v. Place*, Har. Ch. 438; *Griggs v. R. R. Co.*, 10 Mich. 117; *Cooper v. Bigly*, 13 Mich. 463;

issue new matter, which may vary the relief prayed in the original bill, but also for the purpose of putting in issue matter which may prove the complainant's right to relief, originally prayed.¹

In order to file a supplemental bill, it must be shown that the matter relied on as supplemental has arisen since the commencement of the original suit, or that the facts have first become known to the complainant in such a way that he could make use of them since the cause passed the stage in which he might have leave to amend, or that he had been prevented by inadvertence, mistake, or some other cause satisfactorily shown, from availing himself of the matter proposed to be shown at an earlier stage of the case; and the supplemental bill must be confined to such matter, and must be verified by affidavit, or other satisfactory proof.²

The court will also permit other matters to be introduced into the supplemental bill which might have been incorporated in the original, by way of amendment; and this is especially proper where the matter which occurred prior is necessary to the proper elucidation of that which occurred subsequently to the filing of the original bill;³ and when properly before the court it is an addition to the original bill, and becomes a part of it, so that the whole is to be taken as one supplemental bill,⁴ constituting but one cause, requiring but one replication.⁵

A supplemental bill may also be proper in order to bring before the court new parties. In such case the original

Hess v. Final, 32 Mich. 515; *Burke v. Smith*, 15 Ill. 158; *Stafford v. Howlett*, 1 Paige Ch. R. 200; *Fulton Bank v. Canal Co.*, 4 Paige Ch. R. 127; *Walker v. Gilbert*, 7 S. & M. 456; *Wray v. Hutchison*, 2 Mylne & Keene, 235; *Crompton v. Wombwell*, 4 Sim. 628; *Jenkins v. Bank*, 111 Ill. 470.

¹ Story's Eq. Pl. § 332; *Crompton v. Wombwell*, 4 Sim. 628; *Miller v. Cook*, 135 Ill. 190; *Hughes v. Carne*, Id. 519.

² *Pedrick v. White*, 1 Met. 76; *Bowie v. Minter*, 2 Ala. 406; Story's Eq. Pl. § 233; Mitf. Eq. Pl. 55, 61; Hinde's Pr. 42, 43; *Veazie v. Will-*

iams, 3 Story, R. 54; see also *Hasbrook v. Shuster*, 4 Barb. 285; *Collins v. Lavenberg*, 19 Ala. 682; *Mix v. Beach*, 46 Ill. 311; *Choteau v. Rice*, 1 Minn. 106; *Copen v. Flesher*, 1 Bond. 440.

³ *Graves v. Niles*, Harring. Ch. 332.

⁴ *Gillett v. Hall*, 13 Conn. 426; *Potier v. Barclay*, 15 Ala. 439; *Cunningham v. Rogers*, 14 Ala. 147; *Harrington v. Slade*, 22 Barb. N. Y. 161; *Catton v. Carlisle*, 5 Mad. 427; *Greenwood v. Atkinson*, 4 Sim. 628.

⁵ *Id.*; *Id.*; *Choteau v. Rice*, 1 Minn. 106.

defendants need not be made parties, unless they have an interest in the supplemental matter, or may be affected by the interest of such new parties.¹

A stranger to a suit in equity claiming an interest therein, can not interfere with the proceedings without filing a supplemental bill to make himself a party.² And when a supplemental bill is filed, bringing new parties into court, it is, as to them, a new suit, and is to be considered as being commenced when the supplemental bill is filed.³

The filing of a supplemental bill, after a *pro confesso* order, vacates the order, and the defendant may put in an answer.⁴

SECTION II.

WHEN TO BE FILED.

A supplemental bill for the purpose of adding new matter, or for the purpose of bringing new parties before the court, may sometimes be filed after as well as before the decree;⁵ thus, for the purpose of giving directions which were not prayed for in the original bill, but which the result of the proceedings under the decree has rendered proper.⁶ But it can not be filed after a decree dismissing the bill.⁷

SECTION III.

PARTIES TO SUPPLEMENTAL BILL.

When the bill is filed for any new matters arising since the filing of the original bill, the defendants to the original bill ought to be made parties;⁸ but if it is merely to bring before the court formal parties, the defendants in the original bill need not be made parties.⁹

¹ *Bignall v. Atkins*, 6 Mad. 369; *Ensworth v. Lambert*, 4 Johns. Ch. R. 605; *Jones v. Jones*, 2 Atk. 217; *Holdsworth v. Holdsworth*, 2 Dick. 799; *North Am. Coal Co. v. Dyett*, 2 Edw. Ch. 115.

² *Watt v. Crawford*, 11 Paige Ch. R. 470; *Livingston v. Freeland*, 3 Barb. Ch. R. 510.

³ *Morgan v. Morgan*, 10 Geo. 297.

⁴ *Gibson v. Reas*, 50 Ill. 383.

⁵ 2 Barb. Ch. Pr. 62; *Woodward v. Woodward*, 1 Dick. 33; *Boeve v. Skipwith*, 1 Eq. Ca. Ab. 80; 2 Ch. R. 142; 3 Dan. Ch. Pr. 156.

⁶ *Dormer v. Fortescue*, 3 Atk. 124.

⁷ *Burke v. Smith*, 15 Ill. 158.

⁸ *Jones v. Jones*, 3 Atk. 217.

⁹ *Id.*; *Colwell v. Boyer*, 8 Gill & J. 136; *Ensworth v. Lambert*, 4 Johns. Ch. R. 605; *McGowan v. Yerks*, 6 Johns. Ch. R. 450.

Where, however, a person has acquired the interest of a party to a suit, and thinks proper to file a supplemental bill himself, he must make all the parties to the original bill, whether complainants or defendants, parties to his supplemental bill.¹ So, also, where one of the several complainants assigns his interest to a stranger, and the remaining complainants file a supplemental bill against the assignee, they must also make the defendants to the original bill parties to the supplemental bill.²

To entitle a complainant to file a supplemental bill, and thereby to obtain the benefit of the former proceedings, it must be in respect of the same title in the same person, as stated in the original bill. He can not file such a bill to have the benefit of the former proceedings, if he claims by a different title.³

A new party, representing the interest of a former party, who comes before the court by a supplemental bill, whether filed by himself or by the complainant, stands exactly in the same position as the former party, is bound by his acts, and may be subject to all the costs of the proceeding from the beginning of the suit.⁴ Therefore it has been held that a purchaser of the interest of a party *pendente lite*, on filing his supplemental bill, comes into court, whether for gain or loss, and shall be liable to the cost of the proceeding, from the beginning to the end of the suit.⁵ So, also, the assignees of a bankrupt, who are brought before the court by supplemental bill, may be liable to the costs of the whole suit, if they improperly resist the complainant's demand.⁶

SECTION IV.

FORM OF BILL.

A supplemental bill must state the original bill, and the proceedings thereon; and if it is occasioned by an event subsequent to the original bill, it must state that event, and the

¹ 3 Dan. Ch. 180; 2 Barb. Ch. Pr. 69.

² *Feary v. Stephenson*, 1 Beav. 42.

³ Welf. Eq. Pl. 189; 2 Barb. Ch. Pr. 69; *Tonkin v. Lethbridge*, Coop. Eq. R. 33.

⁴ 2 Barb. Ch. Pr. 69; Mitf. Eq. Pl. 68.

⁵ *Anon.*, 1 Atk. 89.

⁶ *Whitcomb v. Minchin*, 5 Mad. 91; 2 Barb. Ch. Pr. 69.

consequent alteration, with respect to the parties; and, in general, the supplemental bill must pray that all the defendants may appear and answer to the charges it contains.¹

The propriety of introducing a restatement of the case from the original bill, into the supplemental bill, must depend upon the question, whether the object of the supplemental bill is to state the mere fact of a bill having been filed, or to put in issue any of the circumstances and facts stated and charged in it.² If the former is the object, the mere statement that the complainant had filed a bill which prayed such and such relief, will be sufficient; or if the pleader should not think this sufficient, he may introduce a short recital.³ If the latter is the object in view, the facts intended to be stated may be set out in the supplemental bill, either by way of original statement, or as a restatement of the facts in the original bill, with an averment of their truth.⁴

Michigan practice.—Chancery rule 26 provides that it shall not be necessary to set forth in a supplemental bill, any of the statements in the original suit, unless the special circumstances of the case require it.

Prayer of.—A supplemental bill generally calls upon the defendant to answer the supplemental matter only. If, however, it is occasioned by the transmission of the interest of a defendant, who has not answered the original bill, and it is necessary to have a discovery from the new defendant, of the matters in the original bill, it may pray that the defendant may answer the original bill.⁵ And in such case the defendant will be bound to answer the original, as well as the supplemental bill.⁶

No. 106. Supplemental bill for specific performance, stating that defendant has brought ejectment, praying for injunction, etc.

STATE OF MICHIGAN.

The Circuit Court for the County of ——. In Chancery.

To the Circuit Court for the County of ——. In Chancery.

1. Your orator, A B, of, etc., respectfully represents unto the court,

¹ 2 Barb. Ch. Pr. 70; Mitf. Eq. Pl. 75; Story's Eq. Pl. § 343.

² Story's Eq. Pl. § 343; 2 Barb. Ch. Pr. 71.

³ 3 Dan. Ch. 177; Gilb. For. Rom. 210; 2 Barb. Ch. Pr. 71.

⁴ 2 Barb. Ch. Pr. 71; *Vigers v. Audley*, 9 Sim. 72.

⁵ *Vigers v. Audley*, 9 Sim. 72.

⁶ 3 Dan. Ch. 72; 2 Barb. Ch. Pr. 72; see *Asbee v. Skipley*, Mad. & Geld. 296.

that on, etc., your orator exhibited his bill of complaint in this honorable court against C D, thereby praying that the said C D might be decreed specifically to perform his agreement with your orator, touching the sale of the real estate in the said bill mentioned, and to execute to your orator a deed therefor, your orator being ready and willing to do everything on his part required to be performed in pursuance of said agreement.

2. Your orator further represents that the said C D appeared and put in his answer to the said bill, and your orator filed a replication thereto; as by the files of the said cause will more fully appear; which said cause is still pending and undetermined in this court.

3. Your orator by way of supplement, further represents, that since the filing of said bill, the said C D has commenced an action of ejectment upon the common law side of this court, for the purpose of recovering the possession of the said premises; which action of ejectment is now pending and undetermined; that your orator has requested the said C D to desist from proceeding with the said action of ejectment, but the said C D refuses so to do, and still continues the prosecution thereof.

Forasmuch, therefore, as your orator is without remedy in the premises, except in a court of equity, your orator prays: 1. That the said C D, who is made a party defendant to this supplemental bill, may be required to make full and direct answer to the same *but not under oath, the answer under oath being hereby waived*. 2. That he may be restrained by the injunction of this court, from proceeding in said action of ejectment, and also from commencing any other action or proceeding at law for the purpose of turning your orator out of the possession of the said premises. 3. That this, your orator's bill of complaint, may be deemed and taken as and for a bill of supplement to his said original bill. 4. And that your orator may have such other and further relief in the premises as equity may require, and to this honorable court shall seem meet.

May it please, etc. (*Prayer for injunction and process, and add affidavit.*)

No. 107. *Supplemental bill against the assignee of a bankrupt defendant.*

STATE OF MICHIGAN.

The Circuit Court for the County of ——. In Chancery.

To the Circuit Court for the County of ——. In Chancery.

Your orator, A B, of, etc., respectfully represents unto the court, that on, etc., your orator filed his bill of complaint in this honorable court against C D, of, etc., praying, etc. (*here insert the substance of the prayer*); that the said C D, having been served with process, appeared and put in his answer to the said bill; and your orator replied to the said answer; but before any further proceedings were had in the said cause, and on, or about, etc., the said C D, was, by the district court in and for the ——— district of ———, adjudged a bankrupt; and one E F, the defendant hereinafter named, having since been duly chosen assignee of the estate and effects of the said bankrupt, and the estate and effects late of the said bankrupt having been conveyed to the said assignee, therefore, your orator is advised that he is entitled to the same relief against the said E F,

as he would have been entitled to against the said C D, if he had not become bankrupt.

Forasmuch, therefore, as your orator is without remedy in the premises, except in a court of equity, your orator prays: 1 That the said E F, who is made party defendant to this bill, may be required to make full and direct answer to the same, *but not on oath, the answer under oath being hereby waived.* 2. And that your orator may have the full benefits of the said suit and proceedings therein against the said E F, and may have the same relief against him as your orator might or could have had against the said C D, in case he had not become bankrupt. 3. And that your orator may have such other or further relief in the premises as equity may require, and to your honor shall seem meet. (*Pray process, as in No. 114.*)

SECTION V.

PETITION FOR LEAVE TO FILE.

A motion, based upon a petition, for leave to file a supplemental bill, is ordinarily addressed to the discretion of the court. Leave is seldom granted to file a supplemental answer, and never without the utmost caution, and when a just and necessary case is clearly made out.¹ The court will examine the question only so far as to ascertain that it is not intended for vexation or delay;² and in ordinary cases, the defendant is not entitled to notice of the application for such order.³

The 57th rule for practice in the courts of equity of the United States, requires notice to be given to the defendant, of an intended application for leave to file a supplemental bill.

No. 108. Petition for leave to file a supplemental bill.

STATE OF MICHIGAN.

The Circuit Court for the County of ———. In Chancery.

A B,
Complainant,
vs.
C D,
Defendant.

To the Circuit Court for the County of ———. In Chancery.

The petition of A B, the above named complainant, respectfully represents, that on, etc., your petitioner filed his bill in this honorable court

¹ *Graves v. Niles*, Har. Ch. 335.

² *Turner v. Berry*, 3 Gilm. 541;
Tapscott v. Evans, 12 N. H. 330;
Petrick v. White, 1 Met. 76; *Kennedy v. Bank*, 8 How. U. S. 533; *Winn v. Albert*, 2 Md. Ch. Decis. 42; *Eager*

v. Price, 2 Paige Ch. R. 333; *Walker v. Hallett*, 1 Ala. (N. S.) 379; *Lawrence v. Bolton*, 3 Paige Ch. R. 294.

³ *Eager v. Price*, 2 Paige Ch. R. 333; *Lawrence v. Bolton*, 3 Paige Ch. R. 294.

against the defendant C D, for the purpose of, etc. (*State generally the object of the bill*), and praying, etc. (*State the substance of the prayer.*)

And your petitioner further represents that the said C D, being served with the subpoena of this court, appeared to said bill, and put in his answer thereto, to which the petitioner filed a replication; that afterward, and before any further proceedings were had in said cause, etc. (*here state the supplemental matter*); wherefore your petitioner is advised that it is necessary to bring the said E F before this court, as a party defendant to this suit.

Your petitioner therefore prays that leave may be granted to him to file a supplemental bill against the said E F, for the purpose of making him a defendant to this suit, with proper and apt words to charge him as such, and with such prayer for relief as may be proper, and for such other, etc.

Solicitor for complainant.
(*Add affidavit.*)

A B.

SECTION VI.

PROCESS, ETC.

In Illinois it has been held that upon the filing of a supplemental bill, it is not necessary that process should issue against a party already in court, nor that an appearance be entered, before a *pro confesso* order can be entered. If new parties are made defendants to the bill, process must issue as in other cases.¹ This is the general rule.²

SECTION VII.

DEFENSES TO.

The defendant to a supplemental bill may either demur, plead or answer, as in other cases.

Demurrer.—If the bill is filed without any sufficient grounds for a supplemental bill, the defendant may demur.³ Thus, if it appears upon the face of the bill that all the matters alleged therein arose previous to the filing of the original bill, and might have been inserted therein by way of amendment, the objection may be taken by demurrer;⁴ even though the bill alleges that the facts were not known to the complainant until the original cause was at issue.⁵

¹ *Mix v. Beach*, 46 Ill. 311.

⁴ *Id.*; 1 Barb. Ch. Pr. 54; 2 Id.

² 1 Hoff. Ch. 404; 2 Barb. Ch. Pr. 76. . 75.

³ *Lawrence v. Bolton*, 3 Paige Ch. R. 294.

⁵ *Colclough v. Evans*, 4 Sim. 76.

Many of the causes of demurrer which apply to original bills, also apply to supplemental bills; but there are some grounds of demurrer which are applicable solely to supplemental bills.¹

If a supplemental bill is filed upon matters arising subsequent to the time of filing the original bill, against a person who claims no interest out of the matters in litigation by the former bill, the defendant to the bill thus brought as a supplemental bill may demur; especially if the bill prays that he may answer the matters charged in the original bill.²

A defendant may also demur if the same complainant files a supplemental bill claiming the same matter as in his original bill, but upon a title totally distinct.³

A motion to strike a supplemental bill from the files for irregularity, on the ground that it does not state supplemental matter, will not lie. The proper course in such case is to demur.⁴

No. 109. Demurrer to supplemental bill.

STATE OF MICHIGAN.

To the Circuit Court for the County of——. In Chancery.

A B,	}	Complainant,
		vs.
C D,		Defendant.

The demurrer of C D, defendant, to the supplemental bill of A B, complainant.

This defendant, etc. (*Proceed as in No. 23 ante, p. 74, to the *, then*), that this defendant, as appears by the said supplemental bill, is not a party to the original bill therein in part stated and set forth; nor does it appear by the said supplemental bill, that any new matter has, or is pretended to have arisen, since the original bill was filed, or that there is any reason that this defendant should not, if necessary, be made a party thereto by amendment.

Wherefore, etc. (*Conclude as in No. 23.*)

Plea.—Besides those grounds of plea which are common to supplemental and original bills, if a supplemental bill is brought on matter which arose before the original bill was

¹ 3 Dan. 183; 2 Barb. Ch. Pr. 75.

² Mitf. Eq. Pl. 202; *Baldwin v. Mackown*. 3 Atk. R. 817; *Story's* Eq. Pl. § 343.

³ *Tonkins v. Lethbridge*, Coop. Eq. R. 83; 2 Barb. Ch. Pr. 75; *Story's* Eq. Pl. § 343.

⁴ *Bowyer v. Bright*, 13 Price, 316.

filed, and which might have been introduced into the original bill, and this fact does not appear upon the face of the supplemental bill, so as to enable the defendant to demur, it may be pleaded.¹ So, if a supplemental bill is filed without any sufficient grounds, the defendant may make the objection by plea.²

Practice as to demurrers and pleas.—Demurrers and pleas to supplemental bills are subject to the same rules, both with respect to their form and substance, and to the practice arising upon them, as demurrers and pleas to original bills.³

No. 110. Plea to a supplemental bill.

STATE OF MICHIGAN.

The Circuit Court for the County of——. In Chancery.

A B,	}
Complainant	
vs.	
C D,	}
Defendant.	

The plea of C D, defendant, to the supplemental bill of A B, complainant.

This defendant, etc. (*Proceed as in No. 34, to the *, then*) the several matters and things in the complainant's present bill stated and set forth by way of supplement, arose, and were well known to the complainant, before and at the time the complainant filed his original bill in this cause; and that such several matters and things can now be introduced, and ought so to be, if necessary, by amending the said original bill.

Wherefore, etc. (*Conclude as in No. 34.*)

Answer.—If the defendant to the supplemental bill neither demurs nor pleads to it, he must put in an answer, as in the case of an original bill. If, however, there is any matter in the supplemental bill which is properly the subject of demurrer or plea, he may, in his answer, claim the same benefit of it as he would have been entitled to had he demurred or pleaded.⁴

Where the defendant is called upon to answer the original bill at the same time he is called upon to answer the supplemental bill, the usual course is to include the answer to

¹ 2 Barb. Ch. Pr. 76; Mitf. Eq. Pl. 290; *Stafford v. Howlett*, 1 Paige Ch. R. 200.

² *Id.*; *Lawrence v. Bolton*, 3 Paige Ch. R. 294.

³ 3 Dan. Ch. Pr. 184; 2 Barb. Ch. Pr. 76.

⁴ 2 Barb. Ch. Pr. 76; 3 Dan. Ch. Pr. 184.

both in the same answer.¹ It is not, however, absolutely irregular to separate them.²

The form of an answer to a supplemental bill, and the manner of putting it in, are the same as in the case of an answer to an original bill, and are subject to the same contingencies.³

After the answer has been put in, and the proceedings on the supplemental bill have arrived at the same point at which the bill stood, they then proceed by the same gradation together.⁴

SECTION VIII.

REPLICATION AND EVIDENCE.

Replication.—A replication may be filed by the complainant in a supplemental suit, to the defendant's answer in the same manner as in an original suit. A separate replication is only necessary where there has already been a replication in the original suit. Where there has been no replication in the original suit, a general replication will apply to the whole record, and not merely to the original bill.⁵

Evidence.—The new matter introduced by the supplemental bill, must be proved, unless it is admitted by the answer or otherwise. If not proved, the supplemental bill will be dismissed with costs. For this purpose witnesses may be examined as to the new matter contained in the supplemental suit.⁶ And where no witnesses have been examined in the original cause, they may be examined to prove the matters in issue in the original cause, as well as those in issue in the supplemental suit.⁷

A supplemental suit is merely a continuation of the original suit, and whatever evidence was properly taken in the original suit, may be made use of in both suits; even though not entitled in the supplemental suit.⁸

¹ *Vigers v. Audley*, 9 Sim. 408.

² *Sayle v. Graham*, 5 Sim. 8; 2 Barb. Ch. Pr. 77.

³ 3 Dan. Ch. Pr. 185; 1 Barb. Ch. Pr. 140-147; 2 Id. 77.

⁴ *Lube's Eq. Pl.* 138; 2 Barb. Ch. Pr. 77.

⁵ 2 Barb. Ch. Pr. 77; *Cotton v. Earl*, 5 Mad. 457; *Gillett v. Hall*, 13

Conn. R. 426; *Choteau v. Rice*, 1 Minn. 106; *Copen v. Flesher*, 1 Bond, 440.

⁶ 2 Barb. Ch. Pr. 77-78.

⁷ 2 Barb. Ch. Pr. 78; 3 Dan. Ch. Pr. 186.

⁸ *Id.*; *Giles v. Giles*, 1 Keen, 685; *Mittf. Eq. Pl.* 74; *Garth v. Wood*, 2 Atk. R. 174.

SECTION IX.

HEARING.

If there has been no decree in the original suit before the filing of the supplemental bill, the original and supplemental suit may come on for hearing together, unless the supplemental bill is for discovery, and one decree will be made in both.¹ But if a decree has been rendered before the event of the supplemental bill was rendered necessary, there must be a decree on the supplemental bill; for which purpose the supplemental cause must be brought to a hearing alone; or it may be heard with the original cause for further direction.²

Entitling orders.—When the original and supplemental suits proceed as one cause, the orders and papers should be entitled, “A B, complainant v. C D, defendant—by original and supplemental bills.”³

Dismissal of bill.—If the supplemental bill is unnecessarily or improperly filed, it will be dismissed at the hearing, although the complainant obtains a decree on the original bill.⁴ So, if no proof is made of the supplemental matter, the bill will be dismissed at the hearing.⁵

¹ Mitf. Eq. Pl. 64, 75; Seaton on Decrees, 385.

² *John v. Brown*, Seaton on Decrees, 385.

³ 2 Barb. Ch. Pr. 79; Seaton on Decrees, 386; Mitf. Eq. Pl. 64; *Adams v. Downing*, 2 Mad. 61.

⁴ *Eager v. Price*, 2 Paige Ch. R. 339.

⁵ *Bagnall v. Bagnall*, 2 Eq. Abr. 173; 6 Bro. P. C. 86; 2 Barb. Ch. Pr. 79.

CHAPTER XVIII.

BILLS IN THE NATURE OF SUPPLEMENTAL BILLS.

Section 1. ORIGINAL BILLS IN THE NATURE OF SUPPLEMENTAL BILLS.

2. BILLS TO CARRY DECREES INTO EXECUTION.

SECTION I.

ORIGINAL BILLS IN THE NATURE OF SUPPLEMENTAL BILLS.

When proper.—A supplemental bill is a mere continuation of the original suit by or against a party having or acquiring the interests of a former party, and it forms, together with the original bill and the proceedings under it, but one record. Cases, however, sometimes occur in practice in which the interest of an original party to a suit is completely determined, and another party becomes interested in the subject-matter, by a title not derived from the original party but in such a manner as to render it but just and reasonable that the benefit of the former proceedings should be had by or against such other party, without incurring the expense and risk of commencing an entirely new proceeding. The course of the court, therefore, enables, that in such cases the benefit of the former proceedings may be obtained by means of a bill called an original bill in the nature of a supplemental bill.¹

The principal difference between this and a supplemental bill, seems to be that a supplemental bill is applicable to such cases only, where the same parties or the same interests remain before the court; whereas, an original bill in the nature of a supplemental bill, is properly applicable where new parties, with new interests, arising from events occurring subsequent to the institution of the suit are brought before the court.²

¹ 2 Barb. Ch. Pr. 85; 3 Dan. Ch. Pr. 230; Hinde Ch. Pr. 71; Blake Ch. Pr. 38.

² Coop. Eq. Pl. 75; Story's Eq. Pl. § 345; *McDonald v. Asay*, 139 Ill. 123.

A bill of this nature is properly called an original bill in the nature of a supplemental bill, because it is original as to the new parties and new interests; and it is, in some sort, supplemental also, as being an appendage to the former bill, as to the old parties and old interests.¹

A bill in the nature of a supplemental bill, may also be required, not only where new interests arise, either before or after a decree, but also where relief of a different kind, or upon a different principle, is required from that in the original decree.²

And an original bill in the nature of a supplemental bill seems to differ from an original bill in the nature of a bill of revivor in this, that upon the latter, the benefit of the former proceedings is absolutely obtained; so that the pleadings in the first cause, as also the depositions of witnesses, may be used in the same manner as if they had been filed or taken in the second cause; and if any decree has been made in the first cause, the same decree will be made in the second cause. But in the case of an original bill in the nature of a supplemental bill, a new defense may be made; the pleadings and depositions can not be used to the same extent as if filed or taken in the same cause; and the decree, if any has been obtained, is not otherwise of advantage than as it may be an inducement to the court to make a similar decree.³

A bill of this kind is not, in all cases, either proper or necessary, merely because new events have occurred since the original bill. But the facts must be material to the original cause, or be such as could not, in that stage of the original cause, be brought into it without such a bill.⁴ For where there is no alteration in the interest of the parties, nor any particular circumstance requiring further discovery, but when a fact only has occurred which might be proved under the proceedings in

¹ Story's Eq. Pl. § 346; Coop. Eq. Pl. 75, 76; Hinde Ch. Pr. 44; *Mole v. Smith*, 1 Jac. & Walk. R. 665; *Foster v. Dison*, 6 Mad. R. 59; *Wellesly v. Wellesly*, 17 Sim. 59; *Lee v. Lee*, Hare R. 621; *Robertson v. Southgate*, 5 Hare R. 223.

² Story's Eq. Pl. § 351 b; *Hodson v. Ball*, 11 Sim. 456, 463; *Phillips*

Ch. R. 177; *Taylor v. Taylor*, 1 Mac. & Gord. R. 405;

³ Barton's Suit in Eq. 132, 133; 2 Barb. Ch. Pr. 85; Mitf. Eq. Pl. 64; 3 Dan. 165; *Adams v. Dowding*, 2 Mad. 53.

⁴ Story's Eq. Pl. §§ 332, 335-337, 352.

the original bill, as in taking an account before the master under the prayer of the original bill, and the relief is not varied by the supplementary matter, but the complainant may have the relief prayed for by such supplementary bill under the original bill, the supplemental bill is improper.'

Form of.—A bill of this nature must state the original bill, the proceedings upon it, the event which has determined the interest of the party by, or against whom the former bill was exhibited, and the manner in which the property has invested in the person become entitled thereto. It must then show the ground upon which the court ought to grant the benefit of the former suit, to or against the person so become entitled, and pray for process against the defendant, to the end that he may answer the premises, and that the complainant may have similar relief against him to that which was prayed in the original bill.¹ This bill, although partaking of the nature of a supplemental bill, is not an addition to the original bill, but another original bill, which, in its consequences, may draw to itself the advantage of the proceedings on the former bill.³

No. 112. Original bill in the nature of a supplemental bill.

STATE OF MICHIGAN.

The Circuit Court for the County of ———. In chancery.

To the Circuit Court for the County of ———. In chancery.

1. Your orator, A B, of, etc., respectfully represents unto the court, that on, etc., one C D, of, etc., being indebted to E F, of, etc., in the sum of — dollars, made and delivered to the said E F his certain promissory note of that date, and thereby promised to pay the said E F the said sum of — dollars, in — after date, with interest at the rate of — per cent per annum, as will appear by the said note ready to be produced in court, and by the copy of the same hereto attached, marked "Exhibit A," and made a part of this your orator's bill.

2. That to secure the payment of the said principal sum and interest as aforesaid, the said C D on the same day, by his mortgage deed of that date, conveyed to the said E F in fee simple, the premises described as follows, viz.. (*here insert description*.) subject, however, to a condition of defeasance, upon the payment of the principal sum and interest aforesaid, according to the tenor and effect of the said note; which said mortgage deed was on, etc., filed for record in the recorder's office of the county of — aforesaid,

¹ *Adams v. Dowding*, 3 Mad. R. 98; 2 Barb. Ch. Pr. 86; Story's Eq. 55; *Roberts v. Roberts*, 16 Sim. R. Pl. § 353.

367; Story's Eq. Pl. § 352.

² *Lube's* Eq. Pl. 227; *Mitf. Eq. Pl.*

³ *Phelps v. Sproule*, 4 Sim. R. 318; *Vigers v. Lord Audley*, 9 Sim R. 75; Story's Eq. Pl. § 353.

as will appear by the said mortgage deed, ready to be produced in court, and by the copy thereof hereto attached, marked "Exhibit B," and made a part of this your orator's bill.

3. Your orator further represents, that the said C D has not yet paid the said principal sum of — dollars, or such interest thereon, or any part thereof, although the same long since became due; by means whereof the said mortgaged property became forfeited, subject nevertheless to redemption in equity by the said C D, his heirs and assigns.

4. Your orator further represents, that on, etc., the said E F exhibited his original bill of complaint in this honorable court, against the said C D, as defendant thereto, thereby stating the matters and things hereinbefore stated, and praying that an account might be taken in that behalf, by or under the direction of the court, of what was due to him for principal and interest on the said note and mortgage, and that the said C D might be decreed to pay to him, the said E F, whatever sum should appear to be due to him, together with the costs of that suit, by a short day to be fixed by the court; or that in default of such payment the said mortgaged property may be sold, as the court should direct, to satisfy such debt and costs; that in case of such sale, and of a failure to redeem therefrom according to law, the said C D, and all persons claiming through or under him, after the commencement of that proceeding, might be forever barred and foreclosed of all equity of redemption, of the said mortgaged property; and that he, the said E F, might have such other and further relief in the premises, as equity may require, and to the court might seem meet.

5. And your orator further represents, that the said C D being duly summoned, appeared and put in his answer to the said bill, to which the said E F replied, and that the said cause being at issue, witnesses were examined on both sides and the proofs closed; as by such bill, answer, replication and proceedings now remaining as of record in this honorable court, reference being thereto had, will more fully appear.

6. And your orator further represents, that before any further proceedings were had in the said cause, and on or about, etc., the said E F was adjudged a bankrupt, by the district court for the — district of —, and all the property, effects and rights of property of the said E F became divested out of him, and became vested in your orator as the general assignee in bankruptcy, appointed as such by the said district court; as by the said proceedings in bankruptcy, now remaining as of record in the said district court, reference being thereto had, will more fully appear.

7. And your orator further represents, that by virtue of his appointment as assignee in bankruptcy of the said E F, as aforesaid, your orator has become entitled to the said principal sum, and interest so due on the said note and mortgage, as aforesaid.

8. And your orator further represents, that by the said bankruptcy of the said E F, the said suit so instituted by him has become defective, but that your orator, as assignee as aforesaid, is entitled to have the benefit of such suit and the proceedings therein, and to prosecute the same against the said C D, from the period when it so became defective as aforesaid, and that for that purpose this his bill ought to be taken as supplemental to the said bill of the said E F.

Forasmuch, therefore, as your orator is without remedy in the premises, except in a court of equity, your orator prays:

1. That the said C D, who is made party defendant to this bill, may be required to make full and perfect answer to the same, *but not under oath, the answer under oath being hereby waived;*

2. That it may be declared that your orator, as such assignee as aforesaid, is entitled to have the benefit of the said original suit, and the proceedings therein.

3. That your orator may be at liberty to prosecute the same against the defendant from the period when the said original suit so became defective by the bankruptcy of the said E F, as aforesaid.

4. That for that purpose this bill may be taken as supplemental to the said bill of the said E F.

5. That your orator may have the same relief against the defendant as the said E F might have had if he had not become bankrupt.

6. And that your orator may have such other and further relief in the premises as equity may require, and to this honorable court shall seem meet.

May it please the court, etc. (*Pray process, as in No. 114.*)

Proceedings upon.—The proceedings upon a bill of this description are the same as those upon original bills in general.¹

SECTION II.

BILLS TO CARRY DECREES INTO EXECUTION.

Nature of.—Sometimes, from the neglect of parties, or some other cause, it becomes impossible to carry a decree into execution without the further decree of court. This happens generally, in case where parties having neglected to proceed upon the decree, their rights under it become so embarrassed by a variety of subsequent events, that it is necessary to have the decree of the court to settle and ascertain them.² Sometimes, such a bill is exhibited by a person who was not a party, or who does not claim under any party to the original decree, but who claims in a similar interest, or who is unable to obtain the determination of his own rights, till the decree is carried into execution. Or, it may be brought by or against any person, claiming as assignee of a party to the decree.³

¹ 2 Barb. Ch. Pr. 86; 3 Dan. Ch. Pr. 192.

² Hinde's Pr. 68; 3 Dan. Ch. Pr. 192; Mitf. Eq. Pl. 95; Barb. Ch. Pr. 86.

³ Story's Eq. Pl. § 429; Coop. Eq.

Pl. 98, 99; *Organ v. Gardner*, 1 Cas. in Ch. 231; *Lord Cartaret v. Paschal*, 3 P. Wms. 197; *Binks v. Binks*, 2 Bligh, 593; *Rylands v. Latouche*, 2 Bligh, 566.

The court in these cases, in general, only enforces, but does not vary the decree. But upon circumstances it has sometimes reconsidered the original directions, and varied them in case of mistake.¹ And, under peculiar circumstances, it has even refused to enforce the decree;² though in other cases the courts seem to have considered that the law of the decree ought not to be examined on a bill to carry it into execution.³

It is to be observed, that although the original decree may sometimes be controverted, upon a bill to carry it into execution, it is only the defendant in the new suit who can call it in question. The complainant never can.⁴ The complainant must, if not satisfied with the decree, impeach it, either by a bill of review, or some proceeding of that kind.⁵

A bill to carry a decree into execution is, generally, partly an original bill, and partly a bill in the nature of an original bill, although not strictly original; and sometimes it is likewise a bill of review, or a supplemental bill, or both.⁶ The frame of the bill is varied accordingly.⁷

No. 113. Bill to carry decree into execution.

STATE OF MICHIGAN.

The Circuit Court for the County of ———, in Chancery. To the Circuit Court for the County of ———, in Chancery.

1. Your orator, A B, of, etc., respectfully represents unto the court, that on, etc., your orator filed his bill of complaint in this honorable court, against C D, stating, etc., (*here set out the substance of the bill—say a bill for partition,*) and praying, etc. (*Here insert the prayer of that bill.*)

2. And your orator further represents, that a summons being served upon the defendant, C D, he appeared and put in his answer thereto, to which a replication was filed. And the said cause being at issue, the same came on to be heard before this honorable court, on, etc., when a decree was rendered by this court that, etc. (*here insert the substance of the decree*), as by the said proceedings and decree now remaining as of record in this honorable court reference being thereunto had, will more fully appear.

¹ Mitf. Eq. Pl. 95; Coop. Eq. Pl. 99; Story's Eq. Pl. § 430; *Terry v. McClintock*, 41 Mich. 492.

² *Id.*; *Attorney-general v. Day*, 1 Ves. 218; *Johnson v. Northey*, Prac. in Ch. 134.

³ *Attorney-general v. Day*, 2 Ves. 232; *Smythe v. Clay*, 1 Bro. P. C. 453; Story's Eq. Pl. § 430; 2 Barb. Ch. Pr. 87.

⁴ *Robinson v. Robinson*, 2 Ves. 225.

⁵ 2 Barb. Ch. Pr. 88; *Shepherd v. Titley*, 2 Atk. 348.

⁶ *Pendleton v. Fay*, 3 Paige Ch. R. 204.

⁷ Mitf. Eq. Pl. 97; Story's Eq. Pl. § 432; see *Polt v. Gallini*, 1 Sim. & Stu. 206.

3. And your orator further represents, that the commission awarded by the said decree never issued, on account of the said E F going abroad, and being, until lately, out of the jurisdiction of this court; but the said E F having now returned, and the inconvenience mentioned in your orator's former bill still existing, your orator is desirous of having the said decree forthwith carried into execution; but from the great length of time which has elapsed, and the refusal of the said C D to concur therein, your orator is advised the same can not be done without the assistance of this honorable court.

Forasmuch, therefore, as your orator is without remedy in the premises, except in a court of equity; your orator prays:

1. That the said C D, who is made a party defendant to this bill, may be required to make full and perfect answer to the same, *but not under oath, the answer under oath being hereby waived.*

2. That the said decree may be directed to be forthwith carried specifically into execution; and the said C D ordered to do and concur in all necessary acts for that purpose.

3. And that your orator may have such other and further relief in the premises as equity may require, and to this honorable court shall seem meet.

May it please the court, etc. (*Prayer for process, as in No. 114.*)

CHAPTER XIX.

BILL OF REVIVOR.

Section 1. NATURE OF.

2. ASSIGNMENT OF SUBJECT-MATTER OF SUIT.

3. BILLS IN THE NATURE OF,

SECTION I.

NATURE OF A BILL OF REVIVOR.

A bill of revivor is the usual mode of reviving and continuing the proceedings whenever there is an abatement of the suit before its final consummation. An abatement in the sense of the common law, is an entire overthrow or destruction of the suit, so that it is quashed and ended.¹ But in the sense of courts of equity, an abatement signifies only a present suspension of all proceedings in the suit, from the want of proper parties capable of proceeding therein. At the common law, a suit, when abated, is absolutely dead; while in equity a suit when abated is in a state of suspended animation; and it may be revived.²

Formerly the death or marriage of one of the original parties to the suit was the most common if not the only cause of abatement in a suit in equity. As the interest of the complainant usually extended to the whole suit, therefore, according to the English rule, upon the death of the complainant, or the marriage of a female complainant, all proceedings became abated.³ Upon the death of a defendant, likewise, all proceedings become abated as to that defendant.⁴ But upon the marriage

¹3 Black. Com. 168; *Putnam v. Putnam*, 4 Pick. 139; see *Griggs v. Gear*, 3 Gilm. 2.

²Story's Eq. Pl. §§ 328, 329, 349, 354; *Bowie v. Minter*, 2 Ala. 406; *Cullom v. Batre*, 2 Ala. 415; *Burnett v. Powers*, 40 Mich. 317.

³Mitt. Eq. Pl. 57; *Story's Eq. Pl.*

§ 354; *Coop. Eq. Pl.* 63; *Spencer v. Wray*, 1 Vern. 463; *Anon.* 3 Atk. 485, 486; *Nichol v. Roosevelt*, 3 Johns. Ch. 60.

⁴Story's Eq. Pl. § 354; *Coop. Eq. Pl.* 63; *Thompson v. Dudley*, 3 Edw. Ch. 137.

of a female defendant the proceedings did not abate, although her husband ought to be named in the subsequent proceedings.¹

The general rule in relation to the abatement of suits in equity, upon the death of parties or the marriage of a *feme sole* complainant or defendant before a final decree, no longer prevails in Michigan and many other States. For it is provided by statute that representatives of deceased parties may be made parties by a suggestion of the death upon the records of the court, when the cause will proceed as in other cases, without amending the bill.²

Where a complainant in chancery dies, the suit is revived by an order substituting his representative as complainant, without amendment of the bill.³

A bill of revivor before a final decree would seem now to be seldom necessary.

The death of the complainant in a divorce case extinguishes the suit and the whole ground of action, and though the proceeding itself survives, a defendant who has taken no appeal from a decree granted therein, can not obtain by petition a standing in court for the purpose of attacking the decree, and can only do so, if at all, by a new suit impleading the parties representing the property interests to be affected.⁴

In the case of the death of a mortgagor, in a foreclosure suit, after payment of the first decree and before proceedings for further decree on an additional installment, it seems to be necessary to file a bill of revivor.⁵

A bill of revivor against a posthumous child, not a party to a suit, can not be filed so as to divest his title *nunc pro tunc*.⁶

Section 6656, How. Stat., provides that no bill of revivor is necessary to revive a suit against the representatives of a deceased defendant or other interested party, and that the

¹ Mitf. Eq. Pl. 58; Gilb. For. Rom. 174, 177; Wyatt Pr. Reg. 90-92; Story's Eq. Pl. § 354.

² *Webster v. Bailey*, 31 Mich. 36; see also Comp. L. 1871, Chap. 176; How. Stat. § 6654.

³ *Webster v. Hitchcock*, 11 Mich.

56; *Webster v. Bailey*, 31 Mich. 36.

⁴ *Zoellner v. Zoellner*, 46 Mich. 511.

⁵ *Brown v. Thompson*, 29 Mich. 72.

⁶ *McConnel v. Smith*, 23 Ill. 611.

court may by order direct the same to stand revived upon the petition of the complainant.¹

Sections 6657-8-9 provide that a copy of the order be served on the representatives if residents, otherwise an order of publication may be granted. That if there be no appearance the answer of the deceased person shall stand and the cause proceed. That if the deceased person had filed no answer and his representatives file none, the bill may be taken as confessed.

Sections 6662-3 provide that if the complainant dies his representative may, on affidavit and motion, be made complainant and permitted to amend the bill, and the defendant must answer the amended bill, and the cause may then proceed as usual. The statute also provides for other contingencies of a like nature.²

The foregoing statutes and Chancery Rule 34, relative to the assignment by complainant of the subject-matter of a suit in chancery, hereinafter set forth, would seem to almost entirely dispense with the necessity of a bill of revivor in Michigan.

For a full investigation of the nature, purpose and scope of a bill of revivor, the attention of the student is directed to the works on chancery pleading referred to in the note below.³

Frame of bill.—The bill must pursue the original bill; it must state who were the complainants and defendants to it, the proceedings thereon, the abatement, the prayer or its object, and show the title of the complainant to revive. It is also necessary to state so much new matter, and no more, as is requisite to show how the complainant becomes entitled to revive, and to charge that the cause ought to be revived, and stand in the same condition, with respect to the parties to the original bill, as it was at the time when the abatement occurred; and it must pray that the suit may be revived accordingly.⁴

Michigan practice.—Chancery Rule 26 provides that, "It shall not be necessary in any bill of revivor, or supplemental

¹ *Stevenson v. Kurtz*, 98 Mich. 493.

² How. St. §§ 6660 to 6663.

³ Story's Eq. Pl. §§ 354-387; Mitf. Eq. Pl. by Jeremy, 98; 2 Barb. Ch.

Pr. 5-58; Barton's Suit in Eq. 129-132; Hunter's Suit in Eq. 126; Welford's Eq. Pl. 207-216.

⁴ Story's Eq. Pl. § 374.

bill, to set forth any of the statements in the original suit, unless the special circumstances of the case may require it." The 49th of the English orders, promulgated in 1841, is to the same effect,¹ and so is 58 Equity Rule of U. S. But this rule does not dispense with the necessity of stating so much of the pleadings in the original suit as is sufficient to show the title of the complainant, as against the defendant, to revive the suit.²

No. 114. Bill of revivor before decree.

STATE OF MICHIGAN.

The Circuit Court for the County of ——. In Chancery.

To the Circuit Court for the County of ——. In Chancery.

1. Your orator, E F, of, etc., respectfully represents unto the court, that on, etc., one A B, late of, etc., but now deceased, exhibited his bill of complaint in this honorable court, against C D, of, etc., as defendant thereto, stating as therein stated, and praying that, etc. (*Here insert the substance of the prayer of the original bill.*)

2. That process was duly issued against the said C D, who appeared and put in his answer to the said bill, to which the said A B put in his replication; and afterward, depositions in said cause were taken by both parties.

3. That afterward the said cause was referred to the master in chancery of this court, to report thereupon, and that some proceedings have been had before the said master, but no general report has yet been made in said cause; and that the said A B, on or about the — day of —, A. D. 18— departed this life intestate.

4. That your orator has been duly appointed his administrator, and has hereby become his legal representative; that the said suit and proceedings having become abated by the death of the said A B, your orator is, as he is advised, entitled, as the personal representative of the said A B, to have the said suit and proceedings revived against the said C D, and to have the said cause in the same state and condition as the same was previously to the death of the said C D.

Forasmuch, therefore, as your orator is without remedy in the premises, except in a court of equity, your orator prays :

1. That the said C D, who is made party defendant to this bill, may be required to make full and direct answer to the same, (*but not under oath, the answer under oath being hereby waived.*)

2. That the said suit may stand revived, and be in the same plight and condition as the same was at the time of the death of the said A B.

3. And that your orator may have such other and further relief in the premises as equity may require, and to your honor shall seem meet.

May it please the court, the premises being considered, to grant unto your orator the most gracious writ of subpoena of the people of the State of

¹ Story's Eq. Pl. § 374.

² *Griffith v. Ricketts*, 3 Hare, 476.

Michigan, to be issued out of and under the seal of this honorable court, to be directed to the said C D, therein and thereby commanding him, on a certain day, and under a certain penalty, to be therein inserted, personally to be and appear before this honorable court, then and there to answer all and singular the said premises, and to stand to, and abide and perform such order and decree therein as shall be agreeable to equity and good conscience. And your orator will ever pray, etc. E F.

_____,
Solicitor for complainant, and of counsel.

No. 115. Bill of revivor after decree—against the surviving executor of one of the defendants, since deceased.

STATE OF MICHIGAN.

The Circuit Court for the County of——. In Chancery.

To the Circuit Court for the County of——. In Chancery.

1. Your orator, A B, of, etc., respectfully represents unto the court, that on, etc., your orator exhibited his bill of complaint in this honorable court, against C D and E D, his wife, of, etc., as defendants thereto stating as therein stated, and praying that, etc. (*Here insert the substance of the prayer of the original bill.*)

2. That process was duly served upon the said C D and E D, his wife; and that they appeared and put in their answers to said bill; to which your orator put in his replication; and afterward on etc., the said cause came on to be heard before this honorable court, when it was ordered, adjudged and decreed, as follows : (*Here set out the decree.*)

3. Your orator further represents that before any further or other proceedings were had in said cause, on, etc., the said C D departed this life, having first duly made and published his last will and testament in writing dated on, etc., and thereby appointed his said wife, E D, and the defendant E F, executrix and executor thereof, who duly proved the said will in the proper court, and took upon themselves the burden of the execution thereof; and the said E D, has since also departed this life, leaving the said defendant, E F, her surviving, and who is now the sole personal representative of the said C D, deceased, and as such entitled to the principal sum of—— dollars, and interest due from the said G H to the said C D, and secured by way of mortgage upon the share of said G H in the said estate and premises in the pleadings mentioned; and the said suit and proceedings having become abated by the death of the said C D, your orator is advised that he is entitled to have the same revived against the said E F, as his surviving executor.

Forasmuch, therefore, as your orator is without remedy in the premises except in a court of equity, your orator prays:

1. That the said E F, who is made party defendant to this bill, may be required to make full and direct answer to the same, *but not under oath, the answer under oath being hereby waived.*

2. That the said suit and proceedings may stand and be revived against the said E F, and be in the same plight and condition as the same were in at the time of the abatement thereof.

3. That your orator may have the benefit thereof;

4. And that your orator may have such other and further relief in the premises as equity may require and to this honorable court shall seem meet. May it please, etc. (*Pray process, as in No. 114—the last form.*)

Defenses to.—If the defendant desires to resist the objects of a bill of revivor, he may demur, plead or answer, as the nature of the case may require.

For a full investigation of the nature, purpose and scope of the different defenses to a bill of review and proceedings on the hearing, see the works on chancery pleading noted below.¹

Order to revive.—If the defendant fails to appear and answer, the bill may be taken as confessed, when an order of course may be entered that the suit stands revived.² So, if the defendant, by his answer, consents to a revival of the suit.³

No. 116. Order for revivor.

(*Caption and title of cause, as in No. 97, ante.*)

This cause coming on to be heard this day, and it appearing to the court that on, etc., the complainant exhibited his bill in this court, against C D and E D, his wife, to be relieved touching the several matters therein contained; that the said C D and E D appeared and put in their answers to said bill, to which the complainant filed a replication; and that afterward, on, etc., the said cause came on to be heard in this court, when it was ordered, adjudged and decreed, that, etc. (*Here set out the decree*); that before any further proceedings were had in said cause, the said C D departed this life, having first duly made his will, thereof appointed the said E D, his wife, and the said E F, executrix and executor, who duly proved the same; and that the said E D has since also departed this life, leaving the defendant, E F, her surviving, as the sole personal representative of the said C D, deceased, and that the said suit and proceedings abated by the death of the said C D; that the complainant has exhibited his bill of revivor in this court against the defendant, E F; and the defendant having been duly served with the process of summons of this court, more than ten days prior to the present term, and having failed to appear and put in his answer, it is ordered that the said suit and proceedings do stand revived against the said E F, and be in the same plight and condition they were in at the time of the death of the said C D.

SECTION II.

ASSIGNMENT OF SUBJECT-MATTER OF SUIT.

Chancery Rule 34, provides that whenever the complainant in a chancery suit, wherein the right is under existing rules of

¹ Barb. Ch. Pr.; Story's Eq. Pl.;
Cuppen's Eq. Pl.; Mitf. Eq. Pl.;
Welf. Eq. Pl. 218; Seaton on De-
crees; Daniell's Chan. Pr.

² Seaton on Decrees, 384.
³ Id.; 2 Barb. Ch. Pr. 50.

law and equity assignable, shall have transferred his interest in the subject-matter of the litigation, either voluntary or by process of law, the suit shall not thereby be abated, but the transferee may present his petition to the court in which said suit is pending, setting up the fact of such transfer, and asking to be substituted as complainant in said suit. The facts, if they do not appear from the records of the court, shall be verified by the affidavit of the party or some other person.

If at the hearing it appear to the court that such transfer has been made, an order shall be made substituting the transferee as complainant in said suit, and said suit shall continue for the benefit of said transferee as though no transfer had been made.

A copy of the petition and affidavits with the usual notice of presenting the same, shall be served on the defendant or his solicitor; or in making such an order the court may, in its discretion, require the transferee to file security for costs.¹

Prior to the adoption of the above rule where the subject-matter of a suit in chancery had been assigned by the complainant, the suit could no longer be prosecuted in his name after the assignment was brought to the notice of the court, and the only mode by which the assignee could revive or get the benefit of the original suit was by filing an original bill in the nature of a bill of revivor and supplement.²

No. 117. Petition for substitution of assignee of mortgage as party complainant.

(Title of court and cause.)

1. Your petitioner, E F, of, etc., respectfully represents unto the court that on, etc., one A B exhibited his bill in this honorable court against C D, of, etc., as defendant thereto, stating, etc. (*Here set forth the substance of the bill for foreclosure*), and praying. (*Here insert prayer of bill.*)

2. Your petitioner further represents that a subpoena in said cause was on, etc., duly issued and served upon the said C D, who appeared and put in his answer to said bill.

3. That afterwards, and before any further or other proceedings were had in said cause, on, etc., for value received, the said A B, assigned and

¹ *Brand v. Smith*, 99 Mich. 395; *Wallace v. Dunning*, Walk. Ch. 416; *Moore v. Smith*, 103 Mich. 389. *Perkins v. Perkins*, 16 Mich. 161;

² *Webster v. Hitchcock*, 11 Mich. *Brewer v. Dodge*, 28 Mich. 359; *Codd* 56; *Griggs v. Ry. Co.*, 10 Mich. 117; *v. Carpenter*, 109 Mich. 120.

transferred the subject-matter of said suit, to wit, the said note in said bill mentioned, and the said mortgage securing the payment of the same to your petitioner, who is now the owner thereof, and that the said A B has no further interest in the same.

Your petitioner therefore prays that he may be substituted as complainant in this suit, and that he may be allowed to prosecute the same for his benefit, the same as though said transfer had not been made.

(Add Affidavit.)

J. K., Sol. for Petitioner.

*No. 118. Order substituting transferee of note as party complainant.
(Caption and title of cause, as in No. 97, ante.)*

This cause this day coming on to be heard upon the petition of E F, heretofore filed herein, and it appearing to the court that on, etc., the complainant exhibited in this court his bill against C D to be relieved touching the matters and things therein contained; that the said C D appeared and put in his answer to said bill. That afterwards on, etc., and before any further proceedings were had in said cause, the said complainant, for value received, transferred and assigned the subject-matter of said bill, to wit, the note and mortgage in said bill mentioned, to the petitioner E F, who is now the owner thereof, and that the complainant has no further interest in the same.

It is therefore ordered, adjudged and decreed that the prayer of said petition be granted, and that the said petitioner E F be, and he is hereby, substituted as complainant in this cause, and that he be allowed to prosecute the same for his benefit the same as though said transfer had not been made.

H C,
Judge.

SECTION III.

BILLS IN THE NATURE OF BILLS OF REVIVOR.

A bill of revivor, properly so called, lies only in cases where a death or marriage intervenes. In each of these cases there is no other fact to be ascertained than whether the new party brought before the court has the character imputed to him. If he has, the revivor is of course.¹ But there are many cases in which there are other facts which may be brought into litigation, besides the mere question of the character of the new party; and to such cases, therefore, the simple bill of revivor does not technically apply. Under such circumstances an original bill, in the nature of a bill of revivor, is the appropriate process to bring those facts before the court, and to put the original proceedings again in motion, and to enable the new party to have the benefit of the former proceedings.²

¹ Coop. Eq. Pl. 64; Story's Eq. Pl. § 377.

² 2 Barb. Ch. Pr. 80-91; Story's Eq. Pl. § 377; Mitf. Eq. Pl. 97; At-

Thus if the death of a party, whose interest is not determined by his death, is attended with such a transmission of his interests, that the title to it, as well as the person entitled, may be litigated in the court of chancery, as in the case of a devise of real estate, the suit is not permitted to be continued by a bill of a revivor. An original bill, upon which the title may be contested, must be filed. And this bill will have so far the effect of a bill of revivor, that if the title of the representative substituted by the act of the deceased party is established, the same benefit may be had of the proceedings upon the former bill, as if the suit had been continued by the revivor.¹

Where all the parties to a suit have died subsequent to the striking of the cause from the docket, the proper practice to bring the case again before the court, is by a bill in the nature of a bill of revivor, by the heirs-at-law of one party against the heirs-at-law of the other party.²

The distinction between bills of revivor and bills in the nature of bills of revivor, seems to be that the former, in case of death, are founded upon mere privity of blood, or representation by operation of law; the latter upon privity of estate, or title by the act of the party.³ In the former case nothing can be in contest, except whether the party be the heir or personal representative; in the latter, the nature and operation of the whole act, by which the privity of estate or title is created, is open to controversy.⁴ Thus, for example, the heir may be made a party by a bill of revivor; for his title is by mere operation of law. But the devisee, or purchaser of the complainant's interest must come in by a bill in the nature of a bill of revivor; for he comes in as a purchaser under the testator in privity of estate or title, which may be disputed.⁵

torney-General v. Foster, 2 Hare, 81, 93, 94; *Perkins v. Perkins*, 16 Mich. 162; *Brewer v. Dodge*, 28 Mich. 259.

¹ Story's Eq. Pl. § 378; Mitf. Eq. Pl. 71, 97; *Clare v. Wordell*, 2 Vern. 548; *Jones v. Jones*, 3 Atk. 217; *Douglas v. Sherman*, 2 Paige Ch. R. 358; *Slack v. Wolcott*, 3 Mason, 508.

² *Welch v. Lewis*, 31 Ill. 446; 29 Ill. 535; 3 Dan. Ch. Pr. 1718.

³ Wyatt Pr. Reg. 90; Story's Eq. Pl., § 379.

⁴ 2 Barb. Ch. Pr. 81; Story's Eq. Pl., § 379; *Slack v. Wolcott*, 3 Mason's R. 508.

⁵ Coop. Eq. Pl. 68, 69, 77; Gilb. For. Rom. 172; Wyatt Pr. Reg. 90; *Douglas v. Sherman*, 2 Paige Ch. R. 358; Story's Eq. Pl. § 379; *Attorney-General v. Foster*, 2 Hare, R. 81, 93; 2 Barb. Ch. Pr. 82.

The bill is said to be original, merely on account of the want of that privity of title between the party to the former bill and the party to the latter bill, although claiming the same interest which would have permitted the continuance of the suit by a bill of revivor.¹ Therefore, when the validity of the alleged transmission of interest is established, the party to the new bill will be equally bound by, or have advantage of, the proceedings on the original bill, as if there had been such a privity between him and the party to the original bill, claiming the same interest.² And the suit is considered as pending from the filing of the original bill, so as to save the statute of limitations, to have the advantage of compelling the defendant to answer, before an answer can be compelled to a cross-bill, and to have every other advantage, which would have attended the institution by the original bill, if it could have been continued by a bill of revivor merely.³

Parties to.—Where a bill in the nature of a bill of revivor is filed by any one who was not a party to the original suit, either as the representative of a deceased party or otherwise, all of the other parties to such original suit, who have any interest in the further proceedings therein, should be made parties to such bill, either as complainants or defendants.⁴

A bill of this nature can not be brought except by some person who claims in privity with the complainant in the original bill.⁵

Frame of bill.—An original bill in the nature of a bill of revivor should, in general, state the same facts as in a bill of revivor. It should state the original bill, the proceedings upon it, the abatement, and the manner in which the interest of the party deceased has been transmitted. It must also charge the validity of the transmission, and state the rights which have accrued by it.⁶ The bill should also pray that the

¹ Mitf. Eq. Pl. 97, 98; Story's Eq. Pl. § 380.

² Story's Eq. Pl. § 380; Mitf. Eq. Pl. 97.

³ Id.; *Merryweather v. Mellich*, 13 Ves. 161, 163.

⁴ *T. Co. v. Seymour*, 5 Paige Ch. R. 538.

⁵ *Oldham v. Eboral*, Coop. Select Cas. 27; *Rylands v. Latouche*, 2 Bligh, 585; *Tonkin v. Lethbridge*, Coop. R. 43; 2 Barb. Ch. Pr. 82.

⁶ Mitf. Eq. Pl. 97; *Phelps v. Sproule*, 4 Sim. R. 318; Story's Eq. Pl. § 386.

suit may be revived, and that the complainant have the benefit of the former proceedings therein.¹

Defenses to, and proceedings upon.—Bills in the nature of bills of revivor are liable to demurrers, pleas or answer, on the same ground as original bills and bills of revivor, of whose nature they partake, and the practice as to demurring, pleading to, and answering them is the same in all respects as the practice upon original bills.²

And in all other respects the practice upon bills of this nature is the same as upon original bills, and they must be brought on for hearing in the same manner before any benefit can be derived from them; a revivor in such cases being only obtained by decree and not by an order to revive, as in the case of an ordinary bill of revivor.³

No. 119. Bill in the nature of a bill of revivor.

STATE OF MICHIGAN.

The Circuit Court for the County of ——. In Chancery.

To the Circuit Court for the County of ——. In Chancery.

1. Your orator, A B, of, etc., respectfully represents unto the court that on, etc., one E F, of, etc., filed his bill of complaint in this honorable court, against C D, of, etc., thereby stating, etc. (*Here set forth the material parts of the bill—supposing it to be a bill for specific performance*), and praying, etc. (*Here set out the substance of the prayer*), that the said C D, being served with process, appeared and put in his answer to the said bill, and E F, the complainant therein, replied thereto, and that the said cause being at issue, witnesses were examined on both sides, and the proofs closed; as by the said bill, answer, replication and proceedings now remaining as of record in this court, reference being thereto had, will more fully appear.

2. And your orator further represents, that before any further proceedings were had in the said suit, and on, etc., he, the said E F, departed this life, leaving D F, the other defendant hereinafter named, his son and only heir, him surviving, and having previously made and published his last will and testament in writing, bearing date on, etc., and executed and attested so as to pass real estate, and having thereby given and devised the said real estate so contracted to be purchased by him as aforesaid, to your orator, his heirs and assigns, and having appointed your orator sole executor thereof, as in and by said bill, when produced, will more fully appear.

3. And your orator further represents that the said will was on, etc., duly proved by your orator, before the — court, of the county of —, whereby your orator became the legal personal representative of

¹ 2 Barb. Ch. Pr. 83; 2 Dan. R. 230; Van Heyth, Eq. Drafts. 348; Barton's Suit in Eq. 132.

² 2 Barb. Ch. Pr. 83; 3 Dan. R. 230.

³ 3 Dan. R. 230; 2 Barb. Ch. Pr. 84.

the said E F, as by the letters testamentary issued by said ——— court, ready to be produced in court, will more fully appear.

4. Your orator further represents, that by virtue of the devise so made to your orator as aforesaid, he is entitled to stand in the place of the said E F, with respect to the said contract of, etc., and to have the same specifically performed, and to have the said premises conveyed, by the said C D, to your orator, upon payment of the said sum of ——— dollars, which sum your orator hereby offers to pay.

5. And your orator represents, that by the death of the said E F, the said suit and proceedings became abated, but that your orator is, as he is advised, entitled to have the same revived against the said C D, and to have the same relief against him, as the said E F would be entitled to if he were still living.

6. And your orator further represents, that the said D F sometimes, though without any ground, questions the validity of the said devise to your orator, and is, therefore, as your orator is advised, a necessary party to this suit.

Forasmuch, therefore, as your orator is without remedy in the premises, except in a court of equity, your orator prays:

1. That the said C D and D F, who are made parties defendant to this bill, may be required to make full and direct answer to the same, *but not on oath, the answer under oath being hereby waived.*

2. That the defendants may, if they can, show why the said suit and proceedings should not be revived and your orator have the relief hereby prayed.

3. That it may be declared that your orator as such devisee of the said E F as aforesaid, is entitled to revive the said suit and proceedings so abated as aforesaid, and to have the benefit thereof.

4. That the said suit and proceedings may be decreed to stand and be revived accordingly, and to be in the same plight and condition as they were in at the time of the said abatement.

5. That your orator may have the same relief against the defendant C D as the said E F would be entitled to if he were still living; and if necessary for that purpose, that the said will of the said E F may be established.

6. And that your orator may have such other and further relief in the premises as equity may require, and to this honorable court shall seem meet.

May it please, etc. (*Pray for process against C D and D F, as in No. 114.*)

CHAPTER XX.

BILLS OF REVIVOR AND SUPPLEMENT.

Nature of; and when proper.—A bill of revivor and supplement is a mere compound of a supplemental bill and a bill of revivor; and in its separate parts it must be framed and proceeded upon in the same manner.¹ It not only continues a suit which has abated, but supplies any defects in the original bill arising from subsequent events.² And whenever a complainant has a right to revive a suit, he may add to the bill of revivor such supplemental matter as is proper to be added.³

It becomes proper where not only an abatement has taken place in a suit, but defects are to be supplied, or new events are to be stated, which have arisen since the commencement of the suit. Thus, if a suit becomes abated, and by any act besides the event by which the abatement happens, the rights of the parties are affected, as by a settlement or a devise, under certain circumstances, although a bill of revivor may continue the suit, so as to enable the parties to prosecute it; yet to bring before the court the whole matter necessary for its consideration, the parties must by supplemental bill, added to and made part of the bill of revivor, show the settlement, or devise, or other act by which their rights are affected. And in the same manner, if any other event which occasions an abatement is accompanied or followed by any matter necessary to be stated to the court, either to show the rights of the parties, or to obtain the full benefit of the suit, beyond what is merely necessary to show by or against whom the cause is to be revived, that matter must be set forth by way of supplemental bill added to the bill of revivor.⁴

¹ Story's Eq. Pl. § 387; Mitf. Eq. Pl. 80.

² *Westcott v. Cady*, 5 Johns. Ch. R. 342; *Pendleton v. Fay*, 3 Paige, Ch. R. 204.

³ *Pendleton v. Fay*, 3 Paige, Ch. R. 204; 2 Barb. Ch. Pr. 88.

⁴ Story's Eq. Pl. § 387; Coop. Eq. Pl. 64; *Merryweather v. Mellich*, 13 Ves. 161, 163, 435; *Bampton v.*

Practice upon.—The bill of revivor and supplement are each liable to the same description of defense as the bills, if separate, would be subject to,¹ and are to be framed and proceeded upon in the same manner as bills of revivor and supplemental bills.² If matters contained in the bill of revivor and supplement are irrelevant or improper, the defendant may avail himself of the objection, either by a plea, or by demurrer, or by exceptions for impertinence.³ But the insertion of supplemental matter in a bill of this nature, will not authorize the defendant to demur to the whole bill. He should demur to the supplemental matter only.⁴

Chancery Rule 26⁵ provides that it shall not be necessary, in any bill of revivor or supplemental bill to set forth any of the statements, in the original suit, unless the special circumstances of the case require it.

No. 120. Bill of revivor and supplement.

STATE OF MICHIGAN.

The Circuit Court for the County of ———. In Chancery.

To the Circuit Court for the County of ———. In Chancery.

1. Your orator, A B, of, etc., respectfully represents unto the court, that on, etc., your orator exhibited his original bill of complaint in this honorable court against C D, of, etc., thereby, etc. (*Here set forth so much of the bill and prayer as may be necessary.*)⁵ And the said C D, being duly served with process, appeared and put in his answer to said bill, and your orator having replied thereto, witnesses were examined in said cause, on both sides; as by the said pleadings and other proceedings in the said cause, now remaining as of record in this honorable court, reference thereunto being had, will more fully appear.

2. And your orator further represents, that before any further proceedings were had in the said cause, and on, etc., the said C D departed this life without issue, leaving E F, of, etc., a defendant hereinafter named, his heir-at-law; and the said suit, and the proceedings therein having become abated, by the death of the said C D, your orator, as he is advised, is entitled to have the same revived against the said E F, as the heir of the said C D, and restored to the same condition in which they were at the time of his death.

Birchall, 1 Phillips, 568; *Manchester v. Matthewson*, 2 R. I. 416; *Rylands v. Latouche*, 2 Bligh, 566.

¹ 3 Dan. Ch. Pr. 232; 2 Barb. Ch. Pr. 89.

² Welf. Eq. Pl. 222; Wilf. Eq. Pl. 80; Coop. Eq. Pl. 84.

³ *Fendleton v. Fay*, 3 Paige Ch. R. 204.

⁴ *Randolph v. Dickerson*, 5 Paige Ch. R. 517; 2 Barb. Ch. Pr. 89.

⁵ See Chan. Rule 26.

3. And your orator, by way of supplement, further represents that the said C D, in his lifetime, duly made and published his last will and testament in writing, in such manner as is by law required for passing real estate, bearing date, etc., and thereby devised all his real estate to G H and L M, and their heirs forever; as in and by the said last will and testament, reference thereto being had, will more fully appear.

4. And your orator further represents, that the said C D departed this life at the time above specified, without having altered or revoked his said will; and that the said G H and L M, respectively claim to be interested in the said premises, by virtue of the said will; and therefore your orator is, as he is advised, entitled to the benefit of the said suit against them, as being, or claiming to be so interested, and to the like relief as he would have been entitled to against the said C D if he were still living; and the said E F, as such heir-at-law as aforesaid, at times disputes the validity of the said will.

Forasmuch, therefore, as your orator is without remedy in the premises, except in a court of equity; your orator prays :

1. That the said E F, G F and L M, who are made parties defendant to this bill, may be required to make full and direct answer to the same, *but not under oath, the answer under oath being hereby waived.*

2. That the said suit and proceedings so abated as aforesaid, may stand revived against the said E F as heir-at-law as aforesaid, and be in the same plight and condition in which they were at the time of the death of the said C D, or that the said E F may show good cause to the contrary.

3. That your orator may have the benefit of the said suit and the proceedings therein against the said E F, G H and L M, who claim to be respectively interested as aforesaid, and such relief as, if the said C D were still living, he would be entitled to against him.

4. That your orator may have such other and further relief in the premises as equity may require and to this honorable court shall seem meet.

May it please, etc. (*Praying process as in No. 114.*)

CHAPTER XXI.

BILLS OF REVIEW.

Section 1. NATURE OF, AND WHEN PROPER.

2. PARTIES TO.
3. LEAVE TO FILE.
4. WITHIN WHAT TIME TO BE BROUGHT.
5. FORM OF BILL.
6. DEFENSES TO.

SECTION I.

NATURE OF, AND WHEN PROPER.

A bill of review is in the nature of a writ of error; and its object is to procure an examination and modification or reversal of a decree rendered upon a former bill.¹

Where it lies.—The two grounds upon which a bill of review, or bill in the nature of a bill of review, will lie, are errors of law appearing on the face of the decree, without further examination of facts; and new facts discovered since the decree, which are material, and which it was impossible for the party to produce at the time the decree was rendered. Bills containing newly-discovered matter are in the nature of original bills, in so far as such new matter presents an issuable fact, and, therefore, admitting an answer, and the formation of an issue; but only so far as it relates to the truth and sufficiency of the alleged new matter, and its admissibility for the purpose of affecting and opening the original decree. The purpose of the bill of the character named is to procure a reversal, alteration or explanation of the former decree.²

¹ *Griggs v. Gear*, 3 Gilm. 2; see *McDaniel v. James*, 23 Ill. 408; *Honer v. Zimmerman*, 45 Ill. 14; *Gardner v. Emerson*, 40 Ill. 296; *Sevier v. Magguire*, 49 Ill. 67.

² *Knobloch v. Mueller*, 123 Ill. 554; *Daniell's Ch. Pr.* 1576; 2 *Smith's Ch. Pr.* 50; *Buffington v. Harvey*, 95 U. S. 99; *Dodge v. Northrop*, 85 Mich. 243.

A bill of review lies for error apparent on the record, or for material evidence not known in time for use at the former trial, and not discoverable by reasonable diligence at that time;¹ and a bill filed after a final decree in the original suit between the original parties or their privies in representation, to correct errors in the proceeding or the decree, is a bill of review.² It is proper after a decree is enrolled. A supplemental bill in the nature of a bill of review, is proper before the enrollment;³ and it has been held that a decree is considered as enrolled after it is signed by the chancellor, and filed by the clerk of the court.⁴ Upon the subject of enrollment, see How. St., §§ 6648-50, 7256; Laws 1895, p. 217; Chan. Rule 24.

A bill of review can not be supported for matter existing at the time of the decree, and discovered since, without affidavit of such matter, and of its existence at the time of the decree;⁵ nor will it lie upon a decree rendered by consent of the parties, unless fraud or mistake is shown;⁶ nor where the complainant himself has dismissed the bill;⁷ nor where the original decree has been affirmed on a writ of error or appeal.⁸

¹ *Ryerson v. Eldred*, 23 Mich. 537; *Taylor v. Boardman*, 25 Mich. 527; *Griggs v. Gear*, 3 Gilm. 2; *Garrett v. Moss*, 22 Ill. 363; *Getzler v. Saroni*, 18 Ill. 511; *Dexter v. Arnold*, 5 Mason, 303; *Quarrier v. Carter*, 4 Hen. & M. 242; *Hodges v. Mulliken*, 1 Bland, 503; *St. Clair v. Piatt*, Wright, 532; *Massie v. Graham*, 3 McLean, 41; *Jenkins v. Prewitt*, 7 Blackf. 329; *Stevens v. Hey*, 15 Ohio, 313; *Greenleaf v. McDowell*, 4 Ired. Eq. R. 481; *James v. Fisk*, 9 Smedes & M. 144; *Kennedy v. Bank*, 8 How. U. S. 586; *United States v. Sampeyas*, 1 Hemp. 118; *Wiser v. Blackley*, 2 Johns. Ch. R. 488; *Hollingsworth v. McDonald*, 2 Har. & J. 230; *Simms v. Thompson*, 1 Dev. Ch. 197; *Burn v. Poang*, 3 Dessau, 596; *Bradshaw v. Garrett*, 1 Porter, 47; *Iler v. Routh*, 3 How. Miss. 276; *Starke v. Mercer*, Ib. 377; *Edmundson v. Moseby*, 4 J. J. Marsh. 497; *Caller v. Shields*, 2

Stew. & Port. 417; *Story's Eq. Pl.* § 407.

² *Whiting v. Bank*, 13 Pet. 6.

³ *Wiser v. Blackley*, 2 Johns. Ch. R. 488; *Hollingsworth v. McDonald*, 3 Har. & J. 230; *Ellzey v. Lane*, 2 Hen. & M. 589; *Iler v. Routh*, 3 How. Miss. 276; see also *Mead v. Arms*, 3 Vt. 148; *Furman v. Coe*, C. C. E. 96; *Bank v. Loomis*, 2 Sandf. Ch. R. 70; *Larson v. Moore*, 1 Texas, 22; *Maynard v. Pereault*, 30 Mich. 160.

⁴ *Hollingsworth v. McDonald*, 2 Har. & J. 230.

⁵ *Hollingsworth v. McDonald*, 2 Har. & J. 230.

⁶ *Flagler v. Crow*, 40 Ill. 414; *Cox v. Lynn*, 138 Ill. 195.

⁷ *Jones v. Zollicoffer*, 1 Car. L. R. 376.

⁸ *Strader v. Byrd*, 7 Ham. 184, 1st part; *Brewer v. Bowman*, 3 J. J. Marsh. 492; 1 Hen. & M. 13.

And after the allowance of an appeal, if the appellant neglects to prosecute it, he will be precluded from filing a bill of review.¹

On a bill of review simply for errors appearing on the face of the former decree evidence will not be heard to show wherein the former decree was erroneous in its findings.²

Matters before known as susceptible of proof, can not be made the ground of a bill of this nature.³ If a complainant goes to trial unprepared, it is no ground for a bill of review; he should ask for a continuance;⁴ and a bill of review can not be permitted after a demurrer has been allowed to a former bill of review, nor after an application for leave to file a bill of review has been refused;⁵ nor can a bill praying for a review of a decree clearly erroneous, from the fact that some of the parties did not answer, and were not served with process, be sustained where the original bill did not contain matter which would entitle the complainant to relief.⁶

It will not be granted for a mistake in the calculation of costs; nor for erroneous deductions from the evidence in the cause by the chancellor; nor for the discovery of new evidence which would not overturn the evidence before in the case;⁷ nor where the party was prevented from proving important facts by the wrong advice of his counsel, or that other counsel was prevented by illness from attending the trial;⁸ or that the attorney employed by the complainant neglected the case. The negligence of the counsel being the same as his own negligence.⁹ But if an attorney enters the appearance of a party without authority; relief may be granted.¹⁰

A bill of review concerns the original controversy only, and does not cover subsequent proceedings.¹¹ A rehearing pre-

¹ *Gilchrist v. Buie*, 1 Dev. & Bat. Ch. R. 346.

² *Burgess v. Pope*, 92 Ill. 255.

³ *Southard v. Russell*, 16 How. U. S. 571; *McDaniel v. James*, 23 Ill. 407.

⁴ *Calmes v. Ament*, 1 A. K. Marsh, 459.

⁵ *Respass v. McClanahan*, Hardin, 342.

⁶ *Todd v. Laughlin*, 3 A. K.

Marsh. 535; *Todd v. Lackey*, 1 Litt. 270.

⁷ *Younge v. Forgey*, 4 Heyw. 189.

⁸ *Franklin v. Wilkinson*, 3 Munf. 112; *Millsbaugh v. McBride*, 7 Paige Ch. R. 509; *Tripp v. Vincent*, 8 Paige Ch. R. 179.

⁹ *Yates v. Monroe*, 13 Ill. 212; *Smith v. Powell*, 50 Ill. 21.

¹⁰ *Griggs v. Gear*, 3 Gilm. 2; 2 Yeates, 546.

¹¹ *Geis v. Green*, 42 Mich. 107.

cedes, and a bill of review follows enrollment; but neither can be had without leave.¹

For error of law.—A bill of review, for error apparent upon the face of the record, must be for an error in law arising out of the facts admitted by the pleadings, or recited in the decree itself, as settled, declared or allowed by the court. It can not be sustained upon the ground that the court has decided wrong upon a question of fact;² but if there has been an erroneous application of the facts found by the decree the court may review or reverse the decree by a bill of review.³ It ought not to be granted to an interlocutory decree; but if there be error therein, it may be corrected on motion or petition.⁴ Errors of law, against which relief can be had by bill of review, must be such as arise rather from obvious mistake or inadvertence, appearing on the face of the decree, or at least of record, than from alleged error in the deliberate judgment of the chancellor, on a debatable question of law or equitable right.⁵ It can not be brought upon the ground that the former decree was not supported by the evidence.⁶ And no evidence is admissible to facts established by the original decree.⁷

The error must appear on the face of the pleadings and decree; for the evidence in the case at large can not be looked into to ascertain whether the court misunderstood the facts.⁸ That is the proper province of the court upon appeal. But taking the facts to be as they are stated to be on the face of the decree, it must be shown that the court has erred in point of

¹ *Mickle v. Maxfield*, 43 Mich. 304.

² *Webb v. Pell*, 3 Paige Ch. R. 368; *Manigault v. Deas*, 1 Bailey Ch. R. 283; *Turner v. Berry*, 3 Gilm. 541; *Evans v. Clements*, 14 Ill. 206; *Garret v. Moss*, 22 Ill. 363; *Fellers v. Rainey*, 82 Ill. 114.

³ *Jackson v. Jackson*, 144 Ill. 274.

⁴ *Banks v. Anderson*, 2 Hen. & M. 20; *Jenkins v. Eldridge*, 3 Story, R. 299; see *Hoig v. Thrapp*, 84 Ill. 302; *Ins. Co. v. Scammon*; 35 Ill. App. 532.

⁵ *Caller v. Shields*, 2 Stew. & Port. 417; *Younge v. Forgey*, 4 Heyw. 189.

⁶ *Dougherty v. Morgan*, 6 Monr. 153; *Whiting v. Bank*, 13 Pet. 6.

⁷ *Johnson v. Donnel*, 15 Ill. 100; *Turner v. Berry*, 3 Gilm. 541; *Evans v. Clements*, 14 Ill. 206; *Garrett v. Moss*, 22 Ill. 363; *Caller v. Shields*, 2 Stew. & Port. 417; *Judson v. Stephens*, 75 Ill. 255.

⁸ Story's Eq. Pl. § 403; *Dexter v. Arnold*, 5 Mason, 303, 310; *Greenwich Bank v. Loomis*, 2 Sandford, 70.

law.¹ If therefore, the decree does not contain a statement of the material facts on which it is founded, it is plain that there can be no relief by a bill of review, but only by an appeal or writ of error to some superior tribunal.² It is on this account that the English decrees are usually drawn up with a special statement of, or reference to, the material grounds of fact which support the decree.

In the courts of the United States, the decrees are usually general, without any such statement of facts. In England, the decree embodies the substance of the bill, pleadings and answers. In the courts of the United States, the decree usually contains a mere reference to the antecedent proceedings, without embodying them. But for the purpose of examining all errors of law, the bill, answers, and other proceedings, are, in our practice, as much a part of the record before the court, as the decree itself; for it is only by a comparison with the former that the correctness of the latter can be sustained.³

And it is said that in the American courts, where the English practice of reciting the proceedings in the decree does not prevail, the proceedings themselves are the subject-matter of revision in a bill of review, to the same extent, and in the same manner, as if they were stated on the face of the decree, in conformity with the English practice.⁴

Upon a bill of review, a court will revise, correct, or reverse its own decree, for an erroneous application of the law to the facts found, whenever a court of appeals would do so for the same cause.⁵

Newly-discovered evidence.—A bill of review lies for newly-discovered evidence material to the issue, if such evidence was not known until after the trial of the cause.⁶ The

¹ 2 Barb. Ch. Pr. 61; Story's Eq. Pl. 403-494.

² *Dexter v. Arnold*, 5 Mason, 311; *Mellish v. Williams*, 1 Vern. 106; *O'Brien v. Connor*, 2 Ball & Beat. 146, 154.

³ Story's Eq. Pl. § 407; *Dexter v. Arnold*, 5 Mason, 311, 312; Wyatt, Pr. Reg. 98; *Combs v. Proud*, 1 Ch. Cas. 51; *Webb v. Pell*, 3 Paige Ch. R. 368.

⁴ *Tomlinson v. McKaig*, 5 Gill, 258.

⁵ *Evans v. Clements*, 14 Ill. 206; *Moore v. Bracken*, 27 Ill. 23; *Briggs v. Gear*, 3 Gilm. 2; *Raymond v. Fisher*, 45 Miss. 145.

⁶ *Ryerson v. Eldred*, 23 Mich. 537; *Dexter v. Arnold*, 5 Mason, 303; *Yates v. Monroe*, 13 Ill. 212; see *Love v. Blevett*, 1 Dev. & Bat. Ch. 108; *Iler v. Routh*, 3 How. Miss. 276;

matter of newly-discovered evidence must be relevant, and such as materially affects the merits of the case; mere accumulative evidence is not sufficient,¹ and the new matter must be to prove what was before in issue, and not to prove a title not before in issue; not to make a new case but to establish the old one.² And unless discovered after the decree is pronounced, it is not ground for a bill of review.³

A bill of review will not be allowed for alleged newly-discovered evidence, where it appears that the evidence was, or might have been, by reasonable diligence known at the hearing of the original bill;⁴ nor because certain documentary evidence, intended to be used in the original cause, was lost or mislaid by the complainant's counsel, and could not be found until after the hearing.⁵

The allowing of a bill of review for newly-discovered evidence rests in the sound discretion of the court.⁶

Randolph v. Randolph, 1 Hen. & M. 181; *Respass v. McCanahan*, Hardin, 312; *Bowles v. South*, Hardin, 451; *Huffacre v. Green*, 4 Heyw. 51.

¹ *Taylor v. Boardman*, 25 Mich. 527; *Livingston v. Hubbs*, 3 Johns. Ch. R. 124; *Ord v. Noel*, 6 Mad. 127; *Blake v. Foster*, 2 Molloy, 257; *Wiser v. Blackley*, 2 Johns. Ch. 488; *Story's Eq. Pl. § 413*; *Hall v. Fullerton*, 69 Ill. 448; *Walker v. Douglas* 89 Ill. 425; *Aholtz v. Durfee*, 122 Ill. 283.

² *Dexter v. Arnold*, 5 Mason, 303; *Young v. Keighley*, 16 Ves. 348, 354; *Huffacre v. Green*, 4 Heyw. 51; *Love v. Blewett*, 1 Dev. & Bat. Ch. 108.

³ *Winston v. Johnson*, 2 Munf. 305; *McCrackin v. Finley*, 1 Bibb. 455; but see *Caller v. Shields*, 2 Stew. & Port. 417.

⁴ *Hodges v. Mullikin*, 1 Bland. 503; *Bradshaw v. Garrett*, 1 Porter, 47; *St. Clair v. Piatt*, Wright, 532; *Barnes v. Dickinson*, 1 Dev. Ch. R. 326; *Gentry v. Thornberry*, 3 Dana, 500; see also *Winston v. Johnson*,

2 Munf. 305; *McCrackin v. Finley*, 1 Bibb. 455; *Quick v. Lilly*, 2 Green, Ch. R. 255; *Dexter v. Arnold*, 5 Mason, 312, 320, 321; *Massie v. Graham*, 3 McLean, 41; *Jenkins v. Prewitt*, 7 Bleckf. 329; *Stephens v. Hey*, 15 Ohio, 313; *Hughes v. Jones*, 2 Md. Ch. Decis. 293; *Robinson v. Sampson*, 26 Maine, 11; *Bingham v. Dawson*, Jacob, 243; *Livingston v. Hubbs*, 3 Johns. Ch. 124, *Pendleton v. Fay*, 3 Paige, Ch. R. 204; *Ord v. Noel*, 6 Mad. 127.

⁵ *Jones v. Pilcher*, 6 Munf. 425. *Speight v. Adams*, 1 Freeman Ch. 318.

⁶ *Griggs v. Gear*, 3 Gilm. 2; *Getzler v. Saroni*, 18 Ill. 511; 2 Dan. Ch. Pr. 1633; *Story's Eq. Pl. § 417*; *Bennett v. Lee*, 2 Atk. 528; *Wilson v. Webb*, 2 Cox, 3; *Young v. Keighly*, 16 Ves. 348; *Perry v. Phelps*, 17 Ves. 176-178; *Thomas v. Harvie's Heirs*, 10 Wheat. 146; *Wood v. Mann*, 2 Sumner, 316; *Massie v. Grant*, 3 McLean, 41; *P. & M. Bank v. Dundas*, 10 Ala. 661; *Taylor v. Taylor*, 1 Mac. & Gord, 405.

A party who has been guilty of *laches* will not be allowed to file a bill of this nature.¹

SECTION II.

PARTIES TO.

No persons, except the parties and their privies in representation, such as heirs, executors and administrators, can have a bill of review, strictly so called.² All parties to the original bill should be made parties.³

A bill of review may be brought by the party who obtained the original decree in his own favor, if such decree was injurious to him.⁴ But a party can not file a bill if he has no interest in the question intended to be presented thereby, and when he can not be benefited by the reversal or modification of the former decree.⁵ And even persons having an interest in the cause, if not aggrieved by the particular error assigned in the decree, can not maintain a bill of review, however injurious the decree may affect the rights of third persons.⁶

Other persons in interest, and in privity of title or estate, who are aggrieved by the decree, such as devisees and remainder-men, are entitled to maintain an original bill in the nature of a bill of review, so far as their own interests are concerned.⁷

A decree against an infant, by agreement, without evidence heard, may be set aside by a bill of review.⁸

A defendant may file a bill of review.⁹

According to the English practice, leave of the court must be obtained before a bill of review can be filed, upon the discov-

¹ *Rubber Co. v. Goodyear*, 9 Wal-lace, 805.

² Story's Eq. Pl., § 409; Gilb. For. Rom. 184; *Slingsby v. Hale*, 1 Ch. Cas. 122; see *Turner v. Berry*, 3 Gilm. 541; *Mickle v. Maynard*, 42 Mich. 304.

³ Coop. Eq. Pl. 95; 2 Barb. Ch. Pr. 94; *Dexter v. Arnold*, 5 Mason, 308; *Bank of U. S. v. White*, 8 Pet. 252.

⁴ *Dexter v. Arnold*, 5 Mason, 308.

⁵ *Webb v. Pell*, 3 Paige Ch. R. 368.

⁶ *Thomas v. Harvie's Heirs*, 10 Wheat. 146; Mitf. Eq. Pl. 205; Story's Eq. Pl., § 409.

⁷ Mitf. Eq. Pl. 92; Wyatt Pr. Reg. 98, 100; *Turner v. Berry*, 3 Gilm. 541; *Singleton v. Singleton*, 8 B. Monroe, 340.

⁸ *Allison v. Drake*, 145 Ill. 500.

⁹ *Osborne v. Usher*, 6 Bro. P. C. 20; 2 Barb. Ch. Pr. 94.

ery of new matter, and which leave the court will grant without an affidavit that the matter could not be produced or used by the party claiming the benefit of it, at the time when the decree was made. And such affidavit must state the nature or the new matter; in order that the court may exercise its judgment upon its relevancy and materiality.¹

Chancery Rule 27 provides, "on filing a bill of review, or other bill in the nature of a bill of review, the complainant shall give the like deposit, or give security to the adverse party in the same amount which is or would be required on an appeal from an order or decree complained of; and no such bill shall be filed, either upon discovery of new matters, or otherwise, without special leave of the court first obtained, nor unless the same is brought within the time allowed for bringing an appeal, except upon newly-discovered facts or evidence, unless upon reasons satisfactory to the court."²

A bill which is in its nature a bill of review not filed under this rule is properly dismissed on motion, but the order of dismissal does not bar further proceedings by complainant under said rule.³

A bill of review upon a decree made in the supreme court is only allowable, if at all, upon leave granted in that court.⁴

Upon an application of this nature, the chancellor exercises his judgment as to the propriety of interfering or meddling with the decree for the cause disclosed, and grants or refuses leave to file a bill of review accordingly.⁵

The court may refuse it to the party applying, and grant it for the protection of the interests of others.⁶

The power of the court to grant or deny an application for leave to file a bill of review is largely discretionary, and is always to be exercised in view of the peculiar circumstances of each case, so as to effectuate substantial justice.⁷

A petition for leave to file a bill in the nature of a bill of

¹ Coop. Eq. Pl. 92 Mitf. Eq. Pl. 84; Gilb. For. Rom. 186-188; Story's Eq. Pl. 412; 2 Barb. Ch. Pr. 95; see *Getzler v. Saroni*, 18 Ill. 511.

² See *Barnes v. Kent*, 97 Mich. 214.

³ *Dodge v. Northrop*, 85 Mich. 243; *Sanford v. Haines*, 71 Mich. 11.

⁴ *Ryerson v. Eldred*, 18 Mich. 490.

⁵ *Hollingsworth v. McDonald*, 2 Har. & J. 230.

⁶ *Hodges v. Milliken*, 1 Bland, 511.

⁷ *Stockey v. Stockey*, 93 Mich. 307; *Bank v. Quick*, 71 Mich. 5.

review will not be granted unless the court sees reason to believe that its allegations can be sustained by proof.¹

It has been held, that leave to file a bill of review, for error in law apparent on the record, is not necessary.²

Performance of decree.—It is a general rule that leave to file a bill of review will not be granted unless the decree has been performed.³ Therefore if the decree be for the payment of money, the party must pay it, or give security, although it should afterward be ordered to be refunded.⁴ But the rule may be dispensed with under the circumstances of each case. Thus, when the party is in execution for non-payment of money under the decree, this is considered equivalent to performance.⁵ So when a party is insolvent,⁶ or has given security for the performance of the decree.⁷

The construction of the rule is, that the party need only perform so much of the decree as at the time of filing his bill he is bound to perform. Whatever he is then bound to do he must do before he files his bill. But the permission to file it is upon the implied engagement that the original decree shall be performed. Therefore if, after the bill is filed, the period arrives when the money ought to be paid, the party must pay it, or an application to dismiss the bill may be made.⁸

If a bill of review is filed without leave, it may be dismissed on motion.⁹

Petition for.—The application for leave to file a bill of review should be made by petition, which should state the nature of the suit, the decree, and the errors of law, or the new matters, as the case may be, upon which the application is founded, and should pray for liberty to file a bill of review, to bring

¹ *Day v. Cole*, 65 Mich. 154.

² *Webb v. Pell*, 1 Paige Ch. R. 564; *St. Clair v. Piatt*, Wright, 532; and see *Getzler v. Saroni*, 18 Ill. 511.

³ *Clark v. Judge Huron Circuit*, 40 Mich. 166; *Wiser v. Blackley*, 2 Johns. Ch. R. 483; *Livingston v. Hubbs*, 3 Johns. Ch. R. 124; see *Griggs v. Gear*, 2 Gilm. 2; *Horner v. Zimmerman*, 45 Ill. 14; *Brutschke v. Verein*, 145 Ill. 433.

⁴ *Lube's Eq. Pl.* 139; 2 Barb. Ch. Pr. 96.

⁵ *Livingston v. Hubbs*, 3 Johns. Ch. R. 124; see *Taylor v. Person*, 2 Hawks. 298.

⁶ *Stalling's Adm'r v. Goodloe's Ex'r*, 3 Mur. 159.

⁷ *Id. Ib.*; 3 Bac. Ord.; *Levil v. Darcey*, 1 Ch. Cas. 42; 2 Barb. Ch. Pr. 90.

⁸ 2 Barb. Ch. 96; *Partridge v. Osborne*, 5 Russ. 251; *Welf. Eq. Pl.* 90; *Gilb. For. Rom.* 185.

⁹ *Carroll v. Parren*, 1 Bland. 125, see *Forman v. Stickney*, 77 Ill. 575.

such decree into review. If the application is founded upon the discovery of new matter, the petition must describe the new evidence distinctly and specifically, and state when it was discovered and its bearing on the decree.¹ It is not sufficient to state that the petitioner expects to prove certain facts. He must state the exact evidence to establish them.

A petition for leave to file a bill of review, after a long delay, will be governed by equitable considerations, and leave will not be granted for technical irregularities.²

On the hearing of such petition, affidavits may be admitted on both sides, if necessary, to explain the nature of the evidence.³

No. 121. Petition for leave to file a bill of review for errors of law.

STATE OF MICHIGAN.

The Circuit Court for the County of——. In Chancery.

A B,	}
Complainant,	
v.	
C D,	}
Defendant.	

To the Circuit Court for the County of——. In Chancery.

1. The petition of A B, the above named complainant, respectfully represents that on, etc., your petitioner filed his bill in this honorable court, against C D, for the purpose of, etc. (*Here state the object of the bill,*) and praying, etc. (*Here state the prayer.*)

2. And your petitioner further represents that the said C D, being served with process, appeared and put in his answer thereto; to which a replication was filed. And the said cause being at issue, witnesses were thereupon examined on both sides, and the proofs closed. And that said cause was brought to a hearing before your honor on, etc.; whereupon a decree was rendered to the following effect, etc. (*Here set forth the substance of the decree.*) (*)

3. And your petitioner further represents, that he is advised that the said decree is erroneous and ought to be reviewed and reversed, and set aside for many apparent errors and imperfections, among which are the following, viz. (*Here set forth the errors complained of.*)

4. For all which errors and imperfections in the said decree appearing on the face thereof, your petitioner is desirous of bringing his bill of review to be relieved in the premises.

Your petitioner therefore prays that leave may be granted to him to file a bill of review against the said C D, for the purpose of having the said

¹ *Dexter v. Arnold*, 5 Mason, 303.

² *Ib.*; *Hollingsworth v. McDonald*,

³ *Johnson v. Shepherd*, 35 Mich. 2 Har. & J. 230; 2 Barb. Ch. P. 95.

decree reviewed, reversed and set aside; and that no further proceedings may be had under the same.

A B.

Sol. for petitioner.

(The petition should be subscribed and sworn to.)

No. 122. *Petition for leave to file a bill of review upon a discovery of new matter.*

(*As in the last form, No. 121, to the asterisk (*) and then*):

4. And your petitioner further represents, that since the rendition of said decree, your orator has discovered new matter of consequence in the said cause, particularly that, etc. (*Here set forth the new evidence distinctly and specifically*); which new matter your petitioner did not know and could not, by reasonable diligence, have known, so as to make use thereof in the said cause, previous to and at the time of the pronouncing the said decree.

5. That your petitioner first learned of the said newly-discovered evidence about, etc. (*Here state when it was first discovered.*) And your petitioner is advised that the said new matter, etc. (*Here state its bearing on the decree.*)

Your petitioner therefore prays that he may be at liberty to file a bill of review for the purpose of having the said decree reviewed, reversed and set aside, and that no further proceedings may be had under the same.

A B.

Sol. for complainant.

(*Add Affidavit.*)

SECTION IV.

WITHIN WHAT TIME TO BE BROUGHT.

In England, twenty years after the pronouncing of the decree is the limitation for a bill of review.¹ In Indiana, a bill of review filed in October, 1832, founded on newly-discovered evidence, alleged to have been discovered in the summer of 1828, was held to have been filed in time.² In that State the statute of limitations begins to run from the time of the discovery of new evidence, which is five years.³

In Illinois, bills of review are limited, like writs of error, to five years.⁴ It is a general rule that a bill of review to impeach a decree for fraud, will not be entertained unless

¹ Lube's Eq. Pl. 132; Coop. Eq. Pl. 92, 93.

² *Jenkins v. Prewitt*, 6 Blackf. 237.

³ *Jenkins v. Prewitt*, 5 Blackf. 7.

⁴ *Lyon v. Robbins*, 46 Ill. 276.

brought within the time allowed by statute for the suing out of a writ of error, or unless some very cogent and convincing reason is shown in excuse of the delay.¹ In Michigan, a bill of review must be filed within the time allowed for bringing an appeal, except upon newly-discovered facts or evidence, unless upon reasons satisfactory to the court.²

No. 123. Order for leave to file bill of review.

(Caption with title of cause, as in No. 97, ante.)

This cause coming on to be heard this day, on the petition of C D, the defendant, praying for leave to file a bill of review in this cause, and counsel for the respective parties having been heard, and the court being fully advised in the premises, does order that the said C D be at liberty to file a bill of review touching the several matters in the said petition mentioned, and for relief in the premises as he may be advised.

SECTION V.

FORM OF BILL.

In a bill of review it is necessary to state the former bill, and all the proceedings under it, the decree and the points in which the party exhibiting the bill considers himself aggrieved by it, and the ground of law upon which he seeks to impeach it; or if it is brought upon newly-discovered evidence, the evidence must be stated distinctly and specifically, and what is its bearing upon the decree sought to be impeached.³

A bill is insufficient which sets out merely a synopsis of the former pleadings.⁴

¹ *Sloan v. Sloan*, 102 Ill. 581; *Story's* Eq. Pl. § 410; *Adams v. Adams*, 51 N. H. 388; *Edson v. Edson*, 108 Mass. 590; *Comstock v. Adams*, 23 Kans. 513; *Rush v. Rush*, 46 Iowa, 648; *Johnson v. Coleman*, 23 Wis. 452. See *Jones v. Floyd*, 117 Ill. 997; *Crouch v. Crouch*, 30 Wis. 667; *Caswell v. Caswell*, 24 Ill. App. Ct. R. 548; *Graves v. Graves*, 36 Iowa, 310; *State v. Whitcomb*, 52 Iowa, 85; *Borden v. Fitch*, 15 Johns. 121; *True v. True*, 6 Minn. 315; *Lawrence v. Lawrence*, 73 Ill. 577.

² Chancery Rule 27; *Sanford v. Haines*, 71 Mich. 116.

³ *Clark v. Judge of Huron Circuit*, 40 Mich. 166; *Gardner v. Emerson*, 40 Ill. 296; *Turner v. Berry*, 3 Gilm. 541; *Getzler v. Saroni*, 18 Ill. 511; *Gilchrist v. Buie*, 1 Dev. & Bat. Ch. 346; *Story's* Eq. Pl. § 420; *Dougherty v. Morgan*, 6 Monr. 151; *Marvin v. Trumbull*, Wright, 386; *Kellom v. Easley*, 2 Abbot's C. C. R. 559; S. C., 1 Dillon, 281; 14 Wallace, 279; *Brutschke v. Verein*, 145 Ill. 433.

⁴ *Aholz v. Durfee*, 123 Ill. 286; *Cox v. Lynn*, 138 Ill. 195.

In bills of review, if the former decree has not been carried into execution, the prayer may simply be that the same may be reversed and set aside; if the former decree has been executed, that the decree be revised, and the complainant be restored to his former condition or *status*, as if it had not been rendered. In bills in the nature of bills of review, instead of praying the revival of the former decree, the prayer should be that the cause be reheard in respect to and considering the new matter, at the same time it is reheard upon the original bill, etc.¹

It seems that a bill of review filed after a foreclosure sale, and after the time for appealing has expired, and allowed on the ground that the property has been sold at a great sacrifice to a purchaser who really represents the complainant, should be accompanied by adequate security, and contain an offer to redeem, or procure a higher bidder.²

The bill must either deny the justice of the demand established by the decree sought to be reviewed, or the complainant must allege that he has paid it and the costs, or else give a sufficient reason for omitting to do so.³

The complainant may join in the same bill both grounds for a bill of review; *first*, error of law, apparent on the face of the decree; and *second*, newly-discovered evidence.⁴

The bill may simply pray that the decree may be reviewed and reversed in the points complained of, if it has not been carried into execution.⁵ If it has been carried into execution, the bill may also pray the further decree of the court to put the party complaining of the former decree into the situation in which he would have been if that decree had not been executed.⁶ If the bill is brought to review the reversal of a former decree, it may pray that the original decree may stand.⁷

¹ *Knobloch v. Mueller*, 123 Ill. 554; *Daniel's Ch. Pr.* 1581, 1582; *Aholtz v. Durfee*, 122 Ill. 286; *Story's Eq. Pl. Sec.* 420; *Goodrich v. Thompson*, 88 Ill. 207; *Turner v. Berry*, 3 Gilm. 544; *Judson v. Stephens*, 75 Ill. 259; *Gardner v. Emerson*, 40 Ill. 297.

² *Thomas v. Burt*, 52 Mich. 489.

³ *Horner v. Zimmerman*, 45 Ill.

14; 2 *Adams' Eq.* 418; *Lube's Eq.* 130.

⁴ 3 *Dan. Ch. Pr.* 1630, note 4; *Griggs v. Gear*, 3 Gilm. 2.

⁵ *Mitt. Eq. Pl.* 83, 89; *Coop. Eq. Pl.* 95; *Story's Eq. Pl.* § 420.

⁶ *Id. Ib.*

⁷ *Dexter v. Arnold*, 5 *Mason*, 308.

No. 124. *Bill of review upon error in law.*

STATE OF MICHIGAN.

The Circuit Court for the County of——. In Chancery.

To the Circuit Court for the County of——. In Chancery.

1. Your orator, A B, of, etc., respectfully represents unto the court, that on, etc., one C D, of, etc., exhibited his original bill of complaint in this honorable court, against your orator, and thereby set forth, that, etc. (*Here the substance of the original bill*), and praying, etc. (*Here set out the prayer*); and your orator being served with process for that purpose, appeared and put in his answer to the said bill, to the effect following, etc. (*Here insert the substance of the answer*), and the said C D filed his replication to said answer; and issue having been joined, and witnesses examined, and the proofs closed, the said cause was brought to a hearing in this honorable court, on, etc., when a decree was rendered; by which it was ordered, adjudged and decreed that, etc. (*Here set forth the decree.*) (*)

2. And your orator further represents, that the said decree is erroneous, and ought to be reviewed, reversed, and set aside for many apparent errors and imperfections, inasmuch as it appears by your orator's answer, among which are the following: (*Here insert the apparent errors*); and no proof being made thereof, no decree ought to have been made or grounded thereon, but the said bill ought to have been dismissed, for the reasons aforesaid. For all which errors and imperfections in the said decree, appearing upon the face thereof, your orator has brought this his bill of review, to be relieved in the premises.

Forasmuch, therefore, as your orator is without remedy in the premises, except in a court of equity, your orator prays:

1. That the said C D, who is made party defendant to this bill, may be required to make full and direct answer to the same, *but not under oath, the answer under oath being hereby waived.*

2. That the said decree may be reviewed, reversed and set aside, and no further proceedings taken thereon.

3. And that your orator may have such other and further relief in the premises as equity may require and to this honorable court shall seem meet.

May it please, etc. (*Praying process as in No. 114.*)

No. 125. *Bill of review on discovery of new matter.*

(*As in the last form, No. 124, to the asterisk (*)*, and then):

2. And your orator further represents, by leave of this honorable court first had and obtained for that purpose, that since the rendition of the said decree, your orator has discovered new matter of consequence and material in said cause, particularly that, etc. (*Here set forth the new matter discovered*); which new matter your orator did not know, and could not, by reasonable diligence have known, so as to make use thereof in the said cause, previous to and at the time of the hearing and the pronouncing of the said decree; and that your orator first learned of the existence of the said newly-discovered evidence about, etc. (*Here give the date of the discovery as near as may be*); and your orator is advised that the said new matter, etc. (*Here state its bearing upon the decree.*)

3. And your orator further represents, that he is advised and insists that under the circumstances aforesaid, the said decree in consequence of the discovery of such new matter as aforesaid, ought to be reviewed and reversed.

Forasmuch, therefore, as your orator is without remedy in the premises, except in a court of equity, your orator prays:

1. That the said C D, who is made a party defendant to this bill, may be required to make full and direct answer to the same, *but not under oath, the answer under oath hereby waived.*

2. That the said decree and all proceedings thereon may be reviewed and reversed, and no further proceedings taken thereon.

3. And that your orator may have such other and further relief in the premises as equity may require, and to this honorable court may seem meet.

May it please, etc. (*Praying process as in No. 114.*

(*Add affidavit as follows:*)

No. 126. Affidavit to a bill of review on discovery of new matter.

STATE OF MICHIGAN, }
County of— } ss.

A B, of, etc., the complainant in the foregoing bill of complaint, on oath, says, that he has heard the same read, and understands the contents thereof; and that the matters set forth therein as new matters, are true in substance and in fact; that they were first discovered by this affiant since the rendition of the decree in the foregoing bill mentioned, to wit, about the time therein stated, and that the same could not possibly be had, known or used at the time when said cause was heard or the decree rendered.

Subscribed, etc.

A. B.

A bill in the nature of a bill of review, should be verified.¹

Binding effect of decrees.—Decrees of courts of chancery, in respect of matters within their jurisdiction, are as binding and conclusive upon the parties and their privies as are judgments at law; and a decree by consent, in an amicable suit, has been held to have an additional claim to be considered final. Decrees so entered by consent can not be reversed, set aside or impeached by bill of review or bill in the nature of a bill of review, except for fraud, unless it be shown that the consent was not in fact given, or something was inserted as by consent that was not consented to.²

Amendment to bill.—A bill of review may, in the discre-

¹ *Sanford v. Haines*, 71 Mich. 116.

² *Daniell's Ch. Pr.* 1576; *Webb v. Webb*, 3 Swanst. 658; *Thompson v. Maxwell*, 95 U. S. 391; *Knobloch*

v. Mueller, 123 Ill. 565; *Allison v. Stark*, 9 A. & E. 225; *Cronk v. Trumble*, 66 Ill. 532.

tion of the court, be amended after a demurrer has been sustained to it. By demurring to the bill before amendment, the defendant admits that the bill is properly in court, and he can not afterward raise the objection that it was filed without the performance of the original decree.¹

SECTION VI.

DEFENSES TO.

The usual mode of defense to a bill of review, founded upon alleged errors apparent from the decree, is to plead the former decree in bar of the suit, and to object by demurrer to the vacation of the decree, alleging as a ground of demurrer, that there is no error in the decree;² or, if the bill is brought on new matter proper to be answered, the defendant must put in an answer, or plead thereto.³

Plea.—It seems that it is not necessary to plead the former decree, if such decree is fully and fairly stated in the bill of review;⁴ and the books of practice contain the forms of demurrer only to such a bill.

Length of time is, it seems, a cause of demurrer, as if the decree has been pronounced above the period of the statute of limitations; and this limitation is to be counted, not from the time of the enrollment of the decree, but from the time of pronouncing it.⁵ It has been said that length of time must be pleaded to review, even if apparent upon the face of the bill that it is brought after the prescribed period; for that otherwise the complainant would not be able to avail himself of the exceptions provided in the statute for cases of disability, as infancy, coverture or the like.⁶ But there is reason to doubt the propriety of this doctrine, and to hold that a demur-

¹ *Forman v. Stickney*, 77 Ill. 575.

² *Coop. Eq. Pl.* 95; *Mitf. Eq. Pl.* 89; *Welf. Eq. Pl.* 242; *Gould v. Tancred*, 2 Atk. 534; *Dancer v. Evett*, 1 Vern. 392; *Smith v. Turner*, 1 Vern. 273; *O'Brien v. O'Connor*, 2 Ball & B. 146; *Axtell v. Pulsifer*, 155 Ill. 141.

³ *Lube's Eq. Pl.* 132; 2 Barb. Ch. Pr. 98.

⁴ *Mitf. Eq. Pl.* 204; *Coop. Eq. Pl.* 215, 216; 2 Barb. Ch. Pr. 98; *Welf.*

Eq. 243; *Slingsby v. Hale*, 1 Ch. Cas. 122; *Jones v. Kenrick*, 5 Bro. C. P. 244, 248; *Barton's Suit in Eq.* 218; *Denny v. Filmer*, 2 Freem. 172.

⁵ *Edwards v. Carroll*, 2 Bro. P. C. 93; *Smythe v. Clay*, 1 Bro. C. C. 539, note.

⁶ *Coop. Eq. Pl.* 216; *Mitf. Eq. Pl.* 204, 205; *Welf. Eq. Pl.* 243; *Gregor v. Molesworth*, 2 Ves. 109.

rer will lie in such a case. If any such exception exists, it is the duty of the complainant to set it forth in his bill of review, in order to repel the objection.¹ This is also sustained by analogy to original bill.²

A bill of review upon the discovery of new matter, is seldom liable to demurrer for being exhibited only by leave of the court, the ground of the bill is generally well considered before it is filed; and therefore, in point of substance, it can rarely be liable to a demurrer.³ Yet even in such case demurrer seems to lie to review for new matter not relevant, though the relevancy ought to be considered when leave is given to file the bill.⁴

If a demurrer to a bill of review has been sustained, it may be pleaded to a new bill on the same grounds, being an effectual bar to another bill of review.⁵

When anything out of the decree, as length of time, purchase for a valuable consideration, or any other matter, is to be offered against the opening of the decree, that matter must be pleaded.⁶

A bill of review upon the discovery of new matter seems liable to any plea, which would have avoided the effect of that matter if charged in the original bill. And a plea lies to the fact of the discovery of new matter.⁷ This has been doubted but the doubt does not seem to be well founded; for if the fact of discovery is in issue in the cause, it ought to be proved, to entitle the complainant to demand the judgment of the court on the matter alleged as ground for reviewing the decree; and it may consequently be disproved by evidence on the part of the defendant.⁸

¹ Welf. Eq. Pl. 243; Mitf. Eq. Pl. 205; *Gregor v. Molesworth*, 2 Ves. 109; *Edwards v. Carroll*, 2 Bro. P. C. 98; *Sherrington v. Smith*, 2 Bro. P. C. 62; *Shepherd v. Larue*, 6 Munf. 529.

² *Cook v. Arnham*, 3 P. Wms. 284; *Foster v. Hodson*, 19 Ves. 180.

³ Welf. Eq. Pl. 243; Mitf. Eq. Pl. 204.

⁴ *Llewellen v. Mackworth*, 2 Atk. 40; Mitf. Eq. Pl. 205; Coop. Eq. Pl. 216.

⁵ *Denny v. Filmer*, 2 Ch. Cas. 133; *Pitt v. Earl of Arglass*, 1 Vern. 441; *Woots v. Tucker*, 2 Vern. 120.

⁶ Welf. Eq. Pl. 244; *Hartwill v. Townsend*, 2 Bro. P. C. 107; *Gorman v. McCulloch*, 5 Bro. P. C. 597; *Brudish v. Gee*, Ambl. 229.

⁷ Mitf. Eq. Pl. 292; Coop. Eq. Pl. 304, 305; Beames' Pl. in Eq. 307.

⁸ Welf. Eq. Pl. 245; Mitf. Eq. Pl. 292; *Dexter v. Arnold*, 5 Mason, 393; Lube's Eq. Pl. 249; 2 Barb. Ch. Pr. 99.

Where a sworn plea to a bill of review is regular in form, and positive in substance, and consists of a denial of the main issue presented, a demurrer to it, if permitted by practice, would be so frivolous as to entitle the pleader to final judgment. And setting the plea down for hearing would be equivalent to a demurrer. If it leaves an issue to be disputed, it should be replied to, and the facts investigated.¹

Demurrer.—The regular defense to a bill of review for errors of law apparent; being, as already stated, to plead the decree in bar to the new suit, and demur to the opening of the decree, on the ground that the errors assigned are not such as to entitle the complainant to have the bill reviewed, much less reversed; the first question being whether the decree should be open and *reviewed*. And this is argued upon the demurrer, when nothing can be read but what appears upon the face of the decree. If the demurrer is overruled, there arises a second question—whether the decree ought to be *reversed*; and the complainant is at liberty to read the original pleadings, or any other evidence, as at a rehearing; the cause being equally open.²

If the bill has assigned errors at law, and the plea and demurrer are allowed, an order to that effect is made, and that the bill be dismissed.³ There is then an end to the suit, and no new bill will be admitted after demurrer allowed.⁴

If the demurrer, or demurrer and plea, are overruled, the usual decree is that the original decree be reversed, and the errors be allowed.⁵

On the argument of a demurrer to a bill of review, where several errors in the decree have been assigned, if the complainant should prevail only in one, the demurrer must be overruled; as one error will be sufficient to open the decree. And on argument of a demurrer to a bill of review for error apparent in the decree, the court has ordered the defendant to answer; saving the benefit of the demurrer to the hearing; and on the hearing has finally allowed the demurrer.⁶

¹ *Thomas v. Burt*, 52 Mich. 489.

Denny v. Filmore, 1 Vern. 135; *Pitt v. Earl of Arglass*, 1 Vern. 441.

² 2 Barb. Ch. Pr. 100; *Lube's Eq. Pl.* 248.

⁵ *Cook v. Bamfield*, 3 Swanst. 607.

³ *Webb v. Pell*, 3 Paige Ch. R. 368.

⁶ 2 Barb. Ch. Pr. 204; *Mitf. Eq. Pl.* 204.

⁴ *Woots v. Tucker*, 2 Vern. 120;

Answer.—If the bill of review is brought on new matter, fitting to be answered, the defendant may put in an answer controverting the fact that the matter is newly discovered.¹

So, if a bill is brought for newly-discovered matter, and a demurrer, or plea and demurrer are overruled, it is laid down that the defendant must answer, as facts are in issue.² The case will proceed upon such a bill as upon an original bill.³

No. 127. Plea to a bill of review.

(*Title of court and cause.*)

The plea of C D, defendant, to the bill of review of A B, complainant.

This defendant, etc. (*As in No. 34 to the asterisk (*), and then*), that by the course and practice of this court no decree ought to be reviewed or reversed by any original bill, or otherwise than by bill of review for errors apparent in the body of the decree, or upon a new matter come to the parties' knowledge after the making of such decree, and that by leave of the court only; wherefor, and for that the said bill of review does not set forth the decree truly, but alleges new and foreign matters not contained in the decree, and prays process generally, to answer and not to review, this defendant pleads the same decree, which is in these words, to wit: (*Here set forth the decree verbatim*) as by the said decree now remaining of record in this honorable court will appear. And this defendant demands the judgment of this honorable court, whether he shall be compelled to make any further or other answer to the said bill of review, or any of the matters and things therein contained, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

No. 128. Demurrer to a bill of review.

(*Title of court and cause.*)

The demurrer of C D, defendant, to the bill of review of A B, complainant.

This defendant, etc. (*As in No. 23, to the asterisk (*), and then*), that by the constant rules of this court no bill of review ought to be admitted to alter or change matters decreed, only for error in law appearing in the body of the decree, as it is drawn up and entered, and for new matter arising since the decree, or such matter of which the complainant in the bill of review could not have notice at the time of the decree; but this defendant is advised that the matters assigned by the said bill of review for cause of reversal of the said decree, as the same thereby appears by the complainant's bill, are neither any error in law apparent in the body of this decree, nor any such new matter as aforesaid, but a misjudgment in matters of form only, and not in point of right; and that the statement contained in

¹ Lube's Eq. Pl. 132; 2 Barb. Ch. Pr. 100; *Dexter v. Arnold*, 5 Mason, 303.

² *Cook v. Bamfield*, 3 Swanst. 607.

³ 2 Hoff. Pr. 12; 2 Barb. Ch. Pr. 100.

the said bill of review of the abatement of the suit before the decree passed, is merely an exception in point of form.

Wherefore, &c. (*Conclude as in No. 23.*)

In what court brought.—The inflexible rule is, that both a bill of review proper, and an original bill in the nature of a bill of review must be brought in the same court in which the decree sought to be reviewed was rendered and enrolled.¹

A state court has no authority or jurisdiction to review the decrees and proceedings of the Circuit Court of the United States." And a bill of review instituted in a state court to set aside and annul a former decree granting a divorce by that court on the ground of fraud is not removable to the Circuit Court of the United States, under the act of congress, although the defendant is a citizen of another state.²

¹ *Windett v. Ins. Co.*, 27 Ill. App. 71; *Griggs v. Gear*, 3 Gilm. (Ill.) 10. ² *Caswell v. Caswell*, 24 Ill. App. 548.

² *Ib.*; *Wetherbee v. Fitch*, 117 Ill. 67; *Maloney v. Dewey*, 127 Ill. 395.

CHAPTER XXII.

BILLS OF DISCOVERY.

Every bill praying relief is, in reality, a bill of discovery, when it asks from the defendant an answer under oath or otherwise, as to all and singular the matters charged in the bill, and seeks from him a discovery of all such matters.¹ But the kind of bill usually distinguished by that title, is a bill for the discovery of facts resting in the knowledge of the defendant, or of deeds, or writings, or other things in his custody or power, and seeking no relief in consequence of the discovery, although it may pray for the stay of proceedings at law till the discovery is made.²

Usually to entitle a complainant to a discovery it must appear that the matters respecting which a discovery is sought are not open to the complainant, but are necessarily within the knowledge of the defendant.³

Since the passage of laws in most of the states, providing that persons interested in the result of the suit shall not be disqualified as witnesses by reason thereof, a resort to bills of discovery is seldom necessary. Furthermore it has been decided by the Supreme Court of Michigan, that since parties have under the statute become general witnesses, a bill of discovery will not lie where the facts sought to be discovered are within the knowledge of any witness,⁴ except in cases of creditor's bill.⁵

Very little space will, therefore, be here occupied in considering bills of this nature. If the student desires to pursue

¹ Story's Eq. Pl. § 811; 2 Story's Eq. Juris. § 689, 1483; Mitf. Eq. Pl. 53; Coop. Eq. Pl. 58; 2 Barb. Ch. Pr. 101; Barton Suit in Eq. 74.

² *Russell v. Clark*, 7 Cranch, 69; *Duncan v. Ingles*, Breese, 277; *Yates*

v. Monroe, 13 Ill. 212; *Shotwell v. Smith*, 20 N. J. Eq. 79.

³ *Bigelow v. Sanford*, 98 Mich. 657.

⁴ *Rispelle v. Doellner*, 26 Mich. 102; *Sheldon v. Walbridge*, 44 Mich. 251.

⁵ *McCreery v. Cobb*, 93 Mich. 463.

the subject more at length, see Hare on Discovery, 2 Story's Equity Jurisprudence, Chap. 41, and other elementary works.

Public Act No. 181 of 1895, authorizing proceedings in the nature of proceedings for discovery, has been held by the supreme court to be unconstitutional.¹

¹ *Mulhern v. Grove*, 111 Mich. 528.

CHAPTER XXIII.

BILL OF INTERPLEADER.

- Section 1. NATURE OF, AND WHEN PROPER.
2. FORM OF BILL.
3. DEFENSES TO.
4. HEARING AND DECREE.

SECTION I.

NATURE OF, AND WHEN PROPER.

Nature of.—When two or more persons claim the same fund or property in different titles, whether legal or equitable, from another, who is in the position of an innocent stakeholder, standing indifferent between them, the latter, if molested by a suit actually brought, or threatened, may file his bill of interpleader, for the purpose of compelling the claimants to litigate their rights at their own expense, and thus protect himself from all vexation and responsibility.¹

A bill of interpleader lies only where two or more persons claim the same debt or duty from the complainant, by different or separate interests.² The respective claims threatening complainant, must be such as to antagonize and negative each other.³ It is proper where suits are threatened;⁴ but will not lie after a judgment at law on the claim in favor of either

¹ Barton's Suit in Eq. 68; Story's Eq. Pl. 291; Hinde Pr. 20; Coop. Eq. Pl. 43; Mitf. Eq. Pl. 32; *Cady v. Porter*, 55 Barb. (N. Y.) 463; *McHenry v. Hazard*, 42 N. Y. 580; *Bedell v. Hoffman* 2 Paige Ch. R. 199; *Atkinson v. Manks*, 1 Cowen, 691; *Cogswell v. Armstrong*, 77 Ill. 139; *Newhall v. Kastens*, 70 Ill. 156; *Heath v. Hurless*, 73 Ill. 323; *Sprague v. Soule*, 35 Mich. 35.

² *Hayes v. Johnson*, 4 Ala. 267;

Green v. Mumford, 4 R. I. 313; *Sherman v. Partridge*, 4 Duer, 646; *Adams v. Dixon*, 19 Geo. 513; *Farley v. Blood*, 10 Foster, 354; *Ryan v. Lamson*, 153 Ill. 550; *Bank v. Look*, 95 Mich. 7; *Bank v. Airey*, 95 Mich. 520.

³ *Moore v. Barnheisel*, 45 Mich. 500.

⁴ *Yarborough v. Thompson*, 3 S. & M. 291; *Hathoway v. Foy*, 40 Mo. 450; *Bank v. Bank*, 54 Ill. App. 483.

or both of the claimants.¹ It is sufficient if, of the two adverse claims against the complainants, one of the claims is legal and the other equitable.²

The bill must show that the complainant is a mere stakeholder, having no personal interest in the controversy;³ it should not set out the facts on which the title of the claimants respectively is based, but ought only to state in a general way the nature of their claims.⁴

A party who is taxed in two different towns for the same property, which is only liable to be taxed once, and where it is doubtful to which town the right to tax belongs, may file a bill of interpleader to compel the collectors of the tax to settle the right between themselves.⁵

It is not necessary for the holder of the fund to file a bill of interpleader, when he is already a party to a suit in chancery, brought by one claimant against the other, to settle the right to the fund. In such case, the holder of the fund should apply by petition, in that suit, for leave to pay the money into court, to abide the event of the litigation between the other parties.⁶

To maintain a bill of interpleader the complainant must be in the possession of the goods or thing in controversy.⁷

But in Connecticut it has been held that if the complainant has paid over money to one of the defendants under a claim of right to which he was obliged to submit, this would not preclude him from sustaining the bill.⁸ So, where a tenant has paid rent to one of the claimants, in ignorance that the title was disputed, he has been allowed to compel the parties to interplead.⁹

¹ Id.

² *Schuyler v. Pelissier*, 3 Edw. Ch. 191; *Richards v. Salter*, 9 Johns. Ch. R. 445; *Yates v. Tisdale*, 3 Edw. Ch. 71; *Burnett v. Bank*, 38 Mich. 630; *Bank v. Look*, 95 Mich. 7.

³ *Cady v. Porter*, 55 Barb. (N. Y.) 463; *Burton v. Black*, 32 Geo. R. 53; *Hathaway v. Foy*, 40 Mo. 540; *Temple v. Lawson*, 19 Ark. 148; *Bank v. Newman*, 55 Ill. App. 541.

⁴ *Shaw v. Coster*, 8 Paige Ch. 339;

Lozier v. Van Saun, 2 Green's Ch. R. 325.

⁵ *R. R. Co v. Clute*, 4 Paige Ch. R. 384; *Thompson v. Ebbets*, Hopk. Ch. R. 272.

⁶ *Badeau v. Rogers*, 2 Paige Ch. R. 209.

⁷ 2 Barb. Ch. Pr. 118; *Burnett v. Anderson*, 1 Mer. 405; *Martin v. Maberry*, 1 Dev. Ch. R. 169.

⁸ *Nash v. Smith*, 6 Conn. R. 421.

⁹ *Jew v. Wood*, 1 Craig & Phil. 185; 2 Barb. Ch. Pr. 118.

A bill of interpleader will not lie if the complainant himself claims any interest in the property in dispute.¹ Nor where the complainant denies any liability to either of the defendants, and neither admits that anything is due to one of them,² nor offers to bring the amount in dispute into court.³

It can not be sustained where the complainant is obliged to admit that, as to either of defendants, he is a wrongdoer.⁴ Nor where it appears, from the bill itself, that there can be no doubt as to which of the defendants is entitled to the fund or duty claimed.⁵ Nor by a sheriff against several creditors, where a controversy arises as to the application of the money in his hands, derived from a sale of a debtor's property on execution.⁶ Nor can a sheriff, who has seized on execution property claimed by a stranger, file a bill against the claimant and the parties to the suit, to settle the question of property.⁷ And a mere agent, having a fund in his hands, as such, which is claimed by a third person, can not file a bill of interpleader; but if the claimant claims title derived from the principal, the bill will lie.⁸

Where the case presented by the bill of interpleader is not a claim by different parties to the same fund or assets in the hands of the complainant, for which he has a right to ask them to discharge him, and interplead between themselves, relief will be denied.⁹ And where no right to compel the defendants to interplead, whatever rights they may claim, each defendant may demur.¹⁰

¹ *Cady v. Potter*, 55 Barb. N. Y. 463; *Long v. Barker*, 85 Ill. 431; *Cogswell v. Armstrong*, 77 Ill. 139; *Alley v. Supervisors*, 76 Ill. 101; *Hellman v. Schneider*, 75 Ill. 422.

² *McHewig v. Hazard*, 45 Barb. N. Y. R. 657; *Parker v. Barker*, 42 N. H. R. 78; 2 Story's Eq. Pl. § 292.

³ *Id.*; *Id.*; *McGarrah v. Prather*, 1 Blackf. Ind. 299.

⁴ *School District v. Weston*, 31 Mich. 85; *Shaw v. Coster*, 8 Paige Ch. R. 339; *Quinn v. Green*, 1 Ired. Ch. R. 229.

⁵ *M. & H. R. R. Co. v. Clute*, 4. Paige Ch. R. 384.

⁶ *Parker v. Barker*, 42 N. H. Rep. 78; *Shaw v. Coster*, 8 Paige Ch. R. 339.

⁷ *Quinn v. Green*, 1 Ired. Ch. R. 329; *Quinn v. Patton*, 2 Ired. Ch. 48.

⁸ *Gibson v. Golthwaite*, 7 Ala. R. 281.

⁹ *Leddlie v. Starr*, 20 N. J. Eq. R. 274; *Haseltine v. Brickey*, 16 Gratt. Va. 116; *Tyns v. Rust*, 27 Geo. 574; *Dunaher v. Prentiss*, 22 Wis. 311; 4 R. I. Rep. 313.

¹⁰ *Welf. Eq. Pl.* 152, 153; 2 Barb. Ch. Pr. 118.

To maintain a bill of interpleader, it is necessary that the complainant should be uncertain to whom the right belongs.¹ And it must be shown that there are persons *in esse* capable of interpleading, and setting up opposite claims.²

Bills of interpleader do not ordinarily lie, except in cases of privity of some sort between all the parties—such as privity of estate, or title, or contract—and where the claim is all of the same nature; for where the claimants assert their rights under adverse titles, and not in privity, and where their claims are of different natures, the bill can not be maintained.³ Thus a tenant, liable to pay rent, may file a bill of interpleader, where there are several persons claiming title to it in privity of contract, or of tenure, to compel them to ascertain to whom it is properly payable.⁴ But if a mere stranger should set up a claim to the rent by a title paramount, and not in privity of contract or tenure; or a claim of a different nature—such as a claim to *mesne* profits in virtue of his title paramount—no bill of interpleader would lie on behalf of the tenant; for the debt or duty is not of the same nature.⁵

But if a person who has a legal demand for a sum of money assigns his interest, the debtor may compel the assignor and assignee to interplead.⁶ So an auctioneer may maintain a bill of interpleader between a vendor and purchaser, who both claim the deposit money at a sale; he being deemed the agent for both parties.⁷ It is a proper proceeding by a party having funds belonging to an estate, which are claimed by different heirs.⁸

Courts of equity are generally very liberal in protecting mere naked trustees or stake-holders against conflicting claims.

¹ 2 Barb. Ch. Pr. 118; Welf. Eq. Pl. 152; Barton's Suit in Eq. 69: *East India Co. v. Edwards*, 18 Ves. 377.

² Coop. Eq. Pl. 46; Story's Eq. Pl. § 295; *Metcalf v. Hervey*, 1 Ves. 248.

³ Coop. Eq. Pl. 48; Mitf. Eq. Pl. 142; *Dungey v. Angove*, 2 Ves. Jr. 304.

⁴ Welf. Eq. Pl. 152; Story's Eq. Pl. § 239; *Lowndise v. Comfort*, 18

Ves. 298; *Langston v. Boylston*, 2 Ves. Jr. 101.

⁵ Story's Eq. Pl. § 239; 2 Barb. Ch. Pr. 119; Welf. Eq. Pl. 153; *Clark v. Byne*, 13 Ves. 383, 386; *Lowe v. Richardson*, 3 Mad. 277.

⁶ *East India Co. v. Edwards*, 18 Ves. R. 377; *Davis v. Davis*, 21 S. E. Rep. 1002.

⁷ *Farebrother v. Prattent*, Dan. Rep. 64; 2 Barb. Ch. Pr. 119.

⁸ *Todd v. Todd*, 56 Ill. App. 392.

An absolute identity in conflicting claims is not requisite to a bill of interpleader; and it is not a valid objection to a bill of interpleader by a trustee sued by claimants to the trust fund, that the complainant would be completely protected by the judgments in the respective suits, by paying them in succession, until the fund is exhausted. A mere trustee, against whom two legal processes are going on at once, has the right to insist that those who claim that to which he makes no claim should settle the contest among themselves. It is no objection that another suit is pending in chancery, in which the complainant, in a bill of interpleader, is defendant, and where the pending litigation is one of the very matters complained of.¹

SECTION II.

FORM OF BILL.

The bill must show that each of the defendant's claims are right,² the difficulty in which the complainant is placed, and should offer to bring the thing claimed into court; for if it is not offered, the court, upon the application of either of the defendants, will order the money or property into court.³ And the want of such an offer is ground for demurrer.⁴ But if the claim is for goods, it is not sufficient to offer to bring the value of the goods into court.⁵

The bill prays that the defendants may interplead; that the court may adjudge to whom the money or thing belongs, and that the complainant may be indemnified.⁶

If the defendants have commenced, or threaten to commence, any proceedings, except at law by ejectment, an injunction must be prayed.⁷

¹ *School District v. Weston*, 31 Mich. 85, and cases there cited.

² Welf. Eq. Pl. 155; 2 Barb. Ch. Pr. 120; Mitf. Eq. Pl. 142; *Martinus v. Helmuth*, 2 Ves. & Bea. 412.

³ *Thanet v. Paterson*, Barnard, 247; *Fuller v. Gibson*, 2 Cox, 24; *Warrington v. Wheatstone*, 1 Jac. R. 202; *East India Co. v. Edwards*, 18 Ves. 376; *Mohawk & Hudson R. Co. v. Clute*, 4 Paige Ch. R. 384; *Show v. Coster*, 8 Paige Ch. R. 339.

⁴ 2 Barb. Ch. Pr. 122; Mitf. Eq. Pl. 49; *Metcalf v. Hervey*, 1 Ves. 248; *Hyde v. Warren*, 19 Ves. 321.

⁵ *Burnett v. Anderson*, 1 Mer. 105.

⁶ Mitf. Eq. Pl. 49; Welf. Eq. Pl. 156.

⁷ *Metcalf v. Hervey*, 1 Ves. 248; *Surrey v. Waltham*, 2 Anst. 539, note; *Jew v. Wood*, 1 Craig & Phil. 185.

Affidavit of non-collusion.—A bill of interpleader must not be brought in collusion with either claimant; therefore the complainant is always required to annex an affidavit that there is no collusion between him and any of the parties.¹ And a want of that affidavit is clearly a cause of demurrer.²

The court will not determine upon counter affidavits, whether the affidavit denying collusion is false.³ But where there is a suspicion of collusion, the court will direct an inquiry into the circumstances.⁴

No. 129. Bill of interpleader.

STATE OF MICHIGAN.

The Circuit Court for the County of ———. In Chancery.

To the Circuit Court for the County of ———. In Chancery.

1. Your orator, A B, of, etc., respectfully represents to the court, that on, etc., at, etc., your orator purchased of one C D, of, etc., one of the defendants hereinafter named, two horses, for which he promised to pay the said C D the sum of ——— dollars, and gave his notes therefor, payable to the said C D ——— after date; that at the time of said purchase the said C D represented, and still insists, that he was the owner of said property, and had good right to sell the same to your orator, and to accept the said notes therefor.

2. And your orator further represents, that afterward, on, etc., one E F, of, etc., a defendant hereinafter named, made known and claimed, and still insists and claims, that he, the said E F, was at the time of said sale the real owner of the property, and that the said C D was not the owner thereof as he pretended to your orator, but was merely the agent for the said E F in making the said sale to your orator; and that the said C D had no authority to take said notes in his own name; and that the said sum of ——— dollars was due and payable to him, the said E F, and not to the said C D; and then and there notified your orator in writing, not to pay the amount of said purchase money to the said C D.

3. Your orator further represents that the said E F has commenced an action at law against your orator, in the ——— court of the county of ——— to recover the purchase money due on said property, and that the said E F is now threatening to bring suit against your orator on the said promissory notes.

4. Your orator further represents that he has always been willing to pay the amount of such purchase money to such person or persons as should be

¹ *Shaw v. Coster*, 8 Paige Ch. R. 339; *Atkinson v. Manks*, 1 Cowen, 691; *Errington v. Attorney-General*, Bumb. 303; *Mitchell v. Hayne*, 2 Sim. & Stu. 63; *Cooper v. DeTastel*, 1 Taml. 177; *Welf. Eq. Pl.* 156; *Mitf. Eq. Pl.* 49, 143; *Tyns v. Rust*, 37 Geo. 574.

² 2 Barb. Ch. Pr. 121; *Metcalf v. Hervey*, 1 Ves. 248.

³ *Langston v. Boylston*, 2 Ves. Jr. 101.

⁴ *Dungey v. Angove*, 2 Ves. Jr. 304.

lawfully entitled to receive the same, and to whom he could pay the same in safety; and he hereby offers to bring the same into court, as the court shall direct.

5. And your orator further represents, that he does not in any respect collude with either of the said named defendants, touching the matters in controversy in this cause; nor is he in any manner indemnified by the defendants, or either of them; nor has he exhibited this, his bill of interpleader, at the request of the defendants, or either of them, but merely of his own free will and to avoid being molested, vexed and harassed touching the matters contained herein.

Forasmuch, therefore, as your orator is without remedy in the premises, except in a court of equity, your orator prays:

I. That the said C D and E F, who are made parties defendant to this bill, may be required to make full and direct answers to the same;

II. That the defendants may severally set forth to which of them the said sum of ——— does of right belong, and is payable, and how in particular they make out their claim thereto;

III. That the defendants may interplead, and settle and adjust their said demands between themselves; your orator being willing and desirous, and agreeing that the said sum may be paid to such of them to whom the same shall, in the judgment of the court, appear of right to belong;

IV. That your orator may be at liberty to bring and pay the said sum of ——— dollars into this honorable court, which your orator hereby offers to do, for the benefit of such of the defendants who shall appear to be entitled thereto, and subject to the further order of the court;

V. That the defendant E F may be restrained, by the injunction of this court, from proceeding against your orator in the said action at law for the purchase money of said property, and that all the defendants may be restrained from commencing any action or actions against your orator for the recovery of the said sum of ——— dollars, or touching any matters or things aforesaid;

VI. That the said C D may be decreed to deliver the said promissory notes to your orator to be canceled;

VII. And that your orator may have such other or further relief in the premises as equity may require, and to this honorable court shall seem meet.

May it please, etc. (*Pray process and injunction, and add affidavit as follows :*)

No. 129a. Affidavit to be annexed to bill of interpleader.

STATE OF MICHIGAN, } ss.
County of ———. }

A B, of, etc., on oath states, that he has exhibited his bill of interpleader against the defendants C D and E F, named in the foregoing bill, without any fraud or collusion between him and the said defendants, or any or either of them; and has not exhibited his said bill at the request of the said defendants, or either of them; and further states, that he has exhibited his said bill with no other intent but to avoid being sued or molested by the said defendants, who are proceeding or threaten to proceed at law for the recovery of the funds mentioned in said bill.

Subscribed, etc.

A B.

SECTION III.

DEFENSES TO.

Demurrer.—If the bill does not show a right to compel the defendants to interplead, a demurrer lies.¹ And if the bill does not show that each of the conflicting parties claims a right, both the defendants may demur; one, because the bill shows no claim of right in him; the other, because the bill, showing no claim of right in the co-defendant, shows no cause of interpleader.² And the want of the affidavit that there is not collusion is clearly a ground for demurrer.³

Whenever an objection to a bill of interpleader appears upon its face, such objection should be raised by demurrer. For if the defendants, instead of demurring, put in an answer insisting that the bill is improperly filed, they will only be allowed, upon the dismissal of the bill, the costs to which they would have been entitled upon the allowance of a demurrer.⁴

If the controversy is concerning a sum of money, the bill must offer to bring it into court or it will be demurrable.⁵

No. 130. Demurrer to bill of interpleader, for want of affidavit of non-collusion.

(As in No. 23 to the asterisk (*) and then proceed) that although the complainant's said bill is on the face thereof a bill of interpleader, and prays that this defendant and the other defendant thereto may interplead together concerning the matters therein mentioned, and may be restrained by injunction from proceedings at law against the complainant touching such matters, yet the complainant has not annexed an affidavit to his said bill that he does not collude concerning such matters with any of the defendants thereto, which affidavit ought, according to the rules of this honorable court, as this defendant is advised, to have been made and annexed to the said bill.

Wherefore, etc. (Conclude as in No. 23.)

¹ Mitf. Eq. Pl. 142; Welf. Eq. Pl. 156; Story's Eq. Pl. § 292.

² Id., Ib.; 2 Story's Eq. Juris. § 821; *Shaw v. Coster*, 8 Paige Ch. R. 339; *Cochrane v. O'Brien*, 2 Jones & La. T. 380.

³ *Metcalf v. Harvey*, 1 Ves. 248; *Shaw v. Chester*, 2 Edw. Ch. R. 405; *Gibson v. Golthwaite*, 7 Ala. 281.

⁴ *Shaw v. Coster*, 8 Paige Ch. R. 339; 2 Barb. Ch. Pr. 123.

⁵ *McGarrah v. Prather*, 1 Blackf. 299; *Shaw v. Chester*, 2 Edw. Ch. 405; but see *Nash v. Smith*, 6 Conn. 421; Coop. Eq. Pl. 49; Barton's Suit in Eq. 47, note 1.

No. 131. Demurrer to bill of interpleader for not showing any claim of right in defendant.

(As in No. 23 ante, to the asterisk (*) and then.) That the complainant has not, in and by the said bill of interpleader, shown any claim or right, title or interest whatsoever, in this defendant, in or to the said —, in the said bill particularly mentioned and described, in respect whereof this defendant ought to be compelled to interplead with the said E F in the said bill named, the other defendant thereto.

Wherefore, etc. (Conclude as in No. 23.)

No. 132. Demurrer to bill of interpleader, for not showing any right in complainant to compel defendants to interplead.

(As in No. 23, ante, to the asterisk (*) and then.) That the complainant has not, in and by his said bill, shown any right or title whatsoever to compel this defendant and E F, the other defendant to the said bill, to interplead.

Wherefore, etc. (Conclude as in No. 23.)

Answer.—The defendant may also put in an answer admitting or denying the facts stated in the bill. If the defendants, or either of them, deny the allegations in the bill, or set up distinct facts in bar of the suit, the complainant must reply to the answer, and close the proofs, in the usual manner, before he can bring his cause to a hearing.¹

If one of the defendants, in a bill of interpleader, in his answer, makes a claim against the complainant beyond the amount admitted to be due and paid into court, and which is not claimed by the other defendant, he will be permitted to proceed at law to establish his right to that part of his demand which is not in controversy with the other defendant.²

Where the facts stated in the bill are admitted in the answer and no new facts are set up in bar of the suit, the cause, upon a replication being filed, is set down for a decree to interplead, before the proofs are taken as between the defendants, and the complainant is dismissed with his costs up to that time, paid out of the fund.³ It is said, however, that

¹ 2 Barb. Ch. Pr. 123; *City Bank v. Bangs*, 2 Paige Ch. 570.

² *City Bank v. Bangs*, 2 Paige Ch. 570; but see *Tel. Co. v. Benson*, 63

Ark. 283; *Glosner v. Weisberg*, 43 Mo. App. 214.

³ *City Bank v. Bangs*, 3 Paige Ch. 570; *Leonard v. Jamison*, 2 Edw. Ch. 136.

it is not usual for the complainant in such cases to file a replication, although it is admissible for him to do so.¹

Injunction, etc.—Until the complainant has brought the money into court, he can not proceed compulsorily by injunction.² The common order for an injunction upon a bill of interpleader is, that it issues upon the complainant paying the money into court. This is a condition precedent, and an order for an injunction not containing it will be discharged.³

The injunction on an interpleading bill stays all proceedings.⁴ It may be moved for at once on payment of the money into court, and before the time for answering has expired.⁵

No. 133. Order for injunction on bill of interpleader.

(Caption and title of cause, as in No. 97, ante.)

On filing bill of interpleader in this cause, duly verified, and an affidavit of non-collusion, it is ordered that an injunction issue pursuant to the prayer of said bill, upon the complainant paying into the hands of the register (or clerk) of this court, the sum of — dollars mentioned in said bill.

Taking bill as confessed.—If one of the defendants does not appear, the bill may be taken as confessed as to him.⁶ And where this is done, if such defendant is an absentee, the other defendant who appears, will not be entitled to the possession of the fund until the expiration of the time limited by the statute for the absent defendant to appear; unless he gives security to repay the money in case the absent defendant appears and establishes his right.⁷

If a defendant permits a bill of interpleader to be taken as confessed against him, it is an admission that, as to him, the bill was properly filed, and that he has made an improper claim against the fund.⁸

¹ *Yates v. Tisdale*, 3 Edw. Ch. 71; see *Atkinson v. Manks*, 1 Cow. 691.

² *Surry v. Waltham*, 2 Anst. 539, note; *Moux v. Bell*, 6 Sims. 175; *Mohawk & Hudson R. R. Co. v. Clute*, 4 Paige Ch. R. 384; *Shaw v. Chester*, 2 Edw. Ch. R. 405.

³ *Sieveking v. Behrens*, 2 My. & Craig. 581; *Welf. Eq. Pl.* 156; 2 Barb. Ch. Pr. 123.

⁴ *Warrington v. Wheatstone*, Jacob, 205.

⁵ *Id.*; *Vicary v. Widger*, 1 Sim. 15.

⁶ *Farebrother v. Prattent*, Dan. R. 64.

⁷ 2 Barb. Ch. Pr. 123-124; *Aymer v. Gaunt*, 2 Paige Ch. R. 284.

⁸ *Badeau v. Rogers*, 2 Paige Ch. 209.

Where one of the defendants is out of the jurisdiction, the complainant is bound to bring him within the jurisdiction in a reasonable time; and if he omits to do so, the other defendant is, upon indemnifying the complainant against those out of the jurisdiction, entitled to the thing in dispute. If the complainant has used due diligence to bring the party within the jurisdiction, the court will not permit such party afterward to proceed at law.¹

The court will not actively interfere to dispose of a fund, except in favor of one who appears, either from proof or a *pro confesso*, to be best entitled.²

Evidence.—In an interpleading suit the answer of one of the defendants may be read against the other.³ Upon the hearing in such suit evidence is admissible to show that the complainant has retained possession of the subject of the suit under an indemnity from some of the defendants.⁴

SECTION V.

HEARING AND DECREE.

The court disposes of the questions arising upon bills of interpleader in various modes, according to the nature of the question, and the manner in which it is brought before the court. It has been already mentioned that if the defendants, or either of them, deny the allegations in the bill, or set up distinct facts in bar to the suit, the complainant must reply, and close the proofs in the usual manner before he can bring his cause to a hearing. But where the defendant admits facts stated in the bill, and on which the right to file such a bill rests, and sets up no new facts as against the complainant, or in bar of his suit, it seems to be sufficient for him to file a replication, and to set the case down for a decree to interplead, without waiting until the proofs are taken as between the defendants.⁵

An interpleading bill is seldom brought to a hearing.⁶

¹ *Stevenson v. Anderson*, 2 Ves. & Bea. 411; Welf. Eq. Pl. 157.

² *Pillow v. Aldridge*, 4 Humph. 287.

³ *Bowyer v. Pitchard*, 11 Price, 103.

⁴ 2 Barb. Ch. Pr. 124; *Statham v. Hall*, Tur. & Rus. 30.

⁵ *City Bank v. Bangs*, 2 Paige Ch. R. 570; Welf. Eq. Pl. 157; 2 Barb. Ch. Pr. 124.

⁶ *Martinius v. Helmuth*, 2 Ves. & Bea. 413.

If a cause is ripe for a decision between the defendants, as well as between them and the complainant, the court settles the conflicting claims of the parties, and makes a final decree on the first hearing. But if it is not in readiness for a decision as between the defendants, the court merely decides that the bill is properly filed, and dismisses the complainant with his costs up to that time, and directs an action to be brought, or an issue, or a reference to the master, to ascertain and settle the rights of the defendants to the fund in controversy.¹

The parties defendant stand before the court to litigate the questions of right pending between them, to the same extent, as if one had brought suit against the other, predicated upon the same matter and for the same question.² And upon a reference to a master to settle the rights of the defendants as between themselves, the court will give them the benefit of a discovery as against each other, if they, or either of them desire it.³

A decree that the bill of interpleader is properly filed is the only decree that the complainant is interested in obtaining.⁴ And there must be a decree to sustain the further proceedings. But if the complainant dies after decree, no bill of revivor is necessary.⁵

Entering a separate decree or order of interpleader, though the better practice, is not necessary when the decree in the bill settles the rights of the parties.⁶

If, after answer by both defendants, one makes default at the hearing, the court will make a decree on hearing the case of the defendant who appears.⁷

If a decree goes on to order a reference to a master by consent of parties, upon principles calculated to adjust the rights of those called upon to interplead, it will be considered a substitute for the ordinary proceedings by actual interpleader.⁸

¹ *Angell v. Hadden*, 16 Ves. 203;
City Bank v. Bangs, 2 Paige Ch. R.
570; Welf. Eq. Pl. 157-158; 2 Barb.
Ch. Pr. 124-125; *Barton's Suit in Eq.*
69.

² *Horton v. Baptist Ch., etc.*, 84
Vt. 309.

³ *City Bank v. Bangs*, 2 Paige Ch.
570.

⁴ *Atkinson v. Manks*, 1 Cow. 691.

⁵ *Jennings v. Nugent*, 1 Moll. 134;
Anon. 1 Vern. 351.

⁶ *Bank v. Look*, 95 Mich. 7.

⁷ *Hodges v. Smith*, 1 Cox's Ca.
357.

⁸ *Atkinson v. Manks*, 1 Cow. 691.

Costs.—Where a bill of interpleader is properly filed, the complainant is, in general, entitled to his costs out of the fund.¹ They are to be paid, in the first instance, by the party entitled to the fund, but eventually by the other.²

Where a bill is unnecessarily filed, however, the complainant will not be allowed his cost out of the fund.³ He will be entitled to his costs only in those cases where the bill is necessarily and properly filed as against both defendants.⁴ But if one of the defendants suffers the bill to be taken as confessed against him, he will be personally charged with all the costs which have been produced in consequence of his unjust claim upon the fund.⁵

Under special circumstances, the defendants will be allowed to have their costs respectively, to be deducted from the fund.⁶

No. 134. Interlocutory decree on a bill of interpleader, directing a reference to master.

(Caption and title of cause, as in No. 97, ante.)

This cause, this day coming on to be heard, upon the bill of interpleader filed therein, the answers of the defendants, and the replication thereto; and the court having heard the arguments of the counsel for the respective parties, and upon consideration thereof, it is ordered, adjudged, and decreed, that the said bill of interpleader is properly filed, and that the defendants do interplead and settle the matters in controversy in this suit between themselves; and for that purpose it is ordered, adjudged, and decreed, that it be referred to the master in chancery of this court, to inquire and report which of the defendants is entitled to the fund in controversy, and which has been deposited with the register (or clerk) of this court. And if the said master shall be of the opinion that any two or more of the defendants are equitably entitled to share in the same, that he also ascertain and report what portion of the fund belongs to each. And it is further ordered that previous to the examination of any witnesses before the said master, either of the parties may present to such master, on oath, a written statement of his claim, and of the facts and circumstances on which it is founded; which statement shall be answered on oath by all the other defendants, to the satisfaction of the said master, and with the like effect, as

¹ *Aymer v. Gault*, 2 Paige Ch. R. 284; *Spring v. Ins. Co.*, 8 Wheat. 268; *Mason v. Hamilton*, 5 Sim. 19; *Campbell v. Solomons*, Sim. & Stu. 462; *Atkinson v. Manks*, 1 Cow. 691.

² *Canfield v. Morgan*, Hopk. 224; *Thompson v. Ebbetts*, Hopk. 272.

³ *Bedell v. Hoffman*, 2 Paige Ch. 199.

⁴ *Badeau v. Rogers*, 2 Paige Ch. R. 209.

⁵ *Badeau v. Rogers*, 2 Paige Ch. 209; 2 Barb. Ch. P. 126.

⁶ *Atkinson v. Manks*, 1 Cow. 691; *Plaster Co. v. White*, 44 Mich. 25.

if such answer was filed to a bill of discovery. And upon such reference, either party is to be at liberty to summons witnesses and proceed before said master in such manner as said master shall direct; and that the solicitor of each defendant have notice of all proceedings before the said master. And it is further ordered; adjudged, and decreed, that the complainant be dismissed with his costs of this suit up to this time, to be taxed, to be paid out of the said fund in court. And this court reserves the consideration of all questions of costs as between the defendants, and all other questions and directions, until the coming in of the master's report; but with liberty to either party to apply for such other instructions or directions to the master as may be necessary or proper, pending the reference.¹

¹See *City Bank v. Bangs*, 2 Paige Ch. R. 573; Seaton on Decrees, 339.

CHAPTER XXIV.

BILLS AND PETITIONS TO PERPETUATE TESTIMONY.

- Section 1. NATURE OF THE PROCEEDINGS.
2. FRAME OF A BILL TO PERPETUATE TESTIMONY.
3. DEFENSES AND PROCEEDINGS.
4. PROCEEDINGS UNDER THE STATUTE.

SECTION I.

NATURE OF THE PROCEEDINGS.

A bill to perpetuate testimony is used where there is reason to fear that the evidence necessary to establish facts, which will probably become the subject of controversy at a future period, may become lost by the death or absence from the country of a material witness.¹ But such bills will not generally be entertained for the purpose of being used upon a future occasion, unless where it is absolutely necessary to prevent a failure of justice.² If it be possible that the matter in question can, by the party who files the bill, be made the subject of immediate judicial investigation, no such bill is entertained.³

SECTION II.

FRAME OF A BILL TO PERPETUATE TESTIMONY.

The bill should state all the the material facts which are necessary to maintain the jurisdiction. It must, in the first place, state the subject-matter touching which the complainant is desirous of giving evidence.⁴ Thus, for example, if the

¹ Barton's Suit in Eq. 73; Story's Eq. Pl. § 300; Welf. Eq. Pl. 139; 2 Barb. Ch. Pr. 136; 1 Coop. Eq. Pl. 52; Mitf. Eq. Pl. 148.

² *Bellamy v. Jones*, 8 Ves. 31; *Shelby v. —*, 13 Ves. 56; see also *Angell v. Angell*, 1 Sim. & Stu. 89.

³ Van Hey. Eq. Drafts. 358.

⁴ Mitf. Eq. Pl. 51; Barton's Suit in Eq. 74; *Allan v. Allan*, 15 Ves. 130; *Knight v. Knight*, 4 Mad. R. 1.

object of the bill is to perpetuate the testimony of the witnesses to a deed respecting real estate, the deed should be properly described, and the names of the witnesses, who are to prove the same, be set forth.¹ And if the object of the bill is to perpetuate the evidence of witnesses to facts *in pais*, it is not sufficient to state generally that they can give evidence as to certain facts; but the bill must state specially what these facts are.²

The bill must show an interest on the part of the complainant in the subject-matter sufficient to entitle him to the aid of the court; for unless he has some interest, he is not entitled to maintain the bill.³ A mere expectancy, however strong, is not sufficient; but the party must have a positive interest.⁴

It is also indispensable to a bill of this kind that it should state that the defendant has, or pretends to have, a title, or that he claims an interest to contest the title of the complainant in the subject-matter of the proposed testimony.⁵ For unless the defendant has, or claims some such interest, it is utterly fruitless to perpetuate the testimony, since it can have no operation on those who are real parties in interest.

It must also be shown that there is some ground of necessity for perpetuating the evidence; as, that the facts to which the proposed testimony relates, can not be immediately investigated in a court of law; or if they can be so investigated, that the sole right of action belongs exclusively to the other party; or that the other party has interposed some impediment to an immediate trial of the right in the suit at law, so that before the investigation can take place, the evidence of a material witness is likely to be lost by his death or departure from the country.⁶ In the former case the bill must allege that the complainant is in possession of the property, or the right,

¹ Story's Eq. Pl. § 300.

² Id.; *Knight v. Knight*, 4 Mad. R. 8, 10; 2 Barb. Ch. Pr. 137.

³ Coop. Eq. Pl. 52; 2 Story's Eq. Juris. § 1511; *Lord Dersley v. Fitz-Harding v. Berkley*, 6 Ves. 251; *Allan v. Allan*, 15 Ves. 130.

⁴ Id.; *ib.*; 1 Fowler, Exch. Pr. 384; Mitf. Eq. Pl. 51; Coop. Eq. Pl. 52-54; *Sackville v. Ayleworth*, 1 Vern. 105.

⁵ Mitf. Eq. Pl. 53; Story's Eq. Pl. § 302; *Barton's Suit in Eq.* 74; Coop. Eq. Pl. 56; 1 Mont. Eq. Pl. 271; *Shirley v. Ferrers*, 3 P. Wms. R. 77; *Brandleigh v. Ord*, 1 Atk. 577.

⁶ Mitf. Eq. Pl. 52, 148; *North v. Gray*, 1 Dick. R. 14, 55; Ch. Pr. 531; Story's Eq. Pl. § 303; *Angell v. Angell*, 1 Sim. & Stu. 83.

without any disturbance by the other party, upon which an action at law can be founded.¹ In the latter case the bill must allege the specific facts on which the complainant puts his case; and also that the witnesses are old or infirm, or in ill health, and not likely to live.² Without such allegations the bill will be clearly demurrable.³

Where a bill is framed on the ground that the testimony of a witness may be lost by his death or departure from the country, before the case can be investigated in a court of law, it seems proper, also, in order to avoid objection, to annex to it an affidavit of the circumstances by which the evidence intended to be perpetuated is in danger of being lost.⁴ But where the bill is sworn to it seems that it will be sufficient to state the circumstances in the bill; and in that case no affidavit will be necessary.⁵

The prayer of the bill requires attention. It should pray leave to examine witnesses touching the matters stated, to the end that their testimony may be preserved and perpetuated.⁶ It should also pray the proper process, but it should not pray that the defendant may abide such order and decree as the court shall think proper to make, for that will turn it into a bill for relief, which is inconsistent with the nature of a bill to perpetuate testimony.⁷ If the bill should pray relief it will be demurrable, and may be dismissed for this cause.⁸

Care should be taken not to mix up in the bill matters which may require very different decretal orders as to the publication of the testimony, otherwise it will be demurrable.⁹

¹ Coop. Eq. Pl. 53; Wyatt Pr. Reg. 74; *Cann v. Cann*, 1 P. Wms. 568.

² Mitf. Eq. Pl. 52; Story's Eq. Pl. § 303; 1 Sim. & Stu. 93; *Fitzhugh v. Lee*, Amb. 65.

³ Story's Eq. Pl. § 303; see *Pearson v. Ward*, 1 Cox, 177.

⁴ *Earl of Suffolk v. Green*, 1 Atk. R. 450; 2 Barb. Ch. Pr. 141; Mitf. Eq. Pl. 52, 150; Story Eq. Pl. § 304; *Phillips v. Carew*, 1 P. Wms. R. 117; *Shirley v. Ferrers*, 3 P. Wms. R. 77.

⁵ 2 Barb. Ch. Pr. 141.

⁶ Mitf. Eq. Pl. 51; Story's Eq. Pl.

§ 306; 2 Barb. Ch. Pr. 141; Coop. Eq. Pl. 52.

⁷ *Rose v. Gannell*, 3 Atk. R. 439; *Vaughan v. Fitzgerald*, 1 Sch. & Lef. 316; *Jerome v. Jerome*, 5 Conn. R. 352; Coop. Eq. Pl. 52; Story's Eq. Pl. § 306.

⁸ *Dalton v. Thompson*, 1 Dick. R. 98; Story's Eq. Pl. § 306; 2 Barb. Ch. Pr. 142.

⁹ *Dew v. Clark*, 1 Sim. & Stu. R. 108; Story's Eq. Pl. § 306; 2 Barb. Ch. Pr. 142; Weif. Eq. Pl. 146.

No. 135. Bill to perpetuate testimony.

STATE OF MICHIGAN.

The Circuit Court for the county of——. In Chancery.

To the Circuit Court for the county of——. In Chancery.

1. Your orator, A B, of, etc., respectfully represents unto the court, that one C D, late of, etc., was in his lifetime, and at the time of his death, seized in fee simple of the following described real property, to wit (*Here insert description*): and being of sound mind and memory, made his last will and testament in writing, which was duly executed and attested by E F and G H, of, etc., two credible persons, which said will, with the attestation thereof, is in the words and figures following, to wit (*Here set forth copy of the will, etc.*): as by the said will, when produced in court, will more fully appear.

2. Your orator further represents that afterward, on, etc., the said C D departed this life, without revoking or altering his said will, or any part thereof; whereupon your orator by virtue of the said will, became entitled in fee simple to all of the said described premises, subject to the payment of so much of the debts and funeral expenses of the said C D as his personal estate may fall short of paying; and your orator accordingly, soon after the death of the said C D entered into possession of the said premises, and now has the exclusive use and control of the same, with the rents and profits thereof. And your orator well hoped that he and his heirs and assigns, would have been permitted to enjoy the same quietly, without any interruption from any person whomsoever. But now so it is, may it please your honor, that E D, of, etc., the defendant hereinafter named, who claims to be a brother and heir-at-law of the said C D, pretends that the said C D did not make and execute such last will and testament in writing, or that he was not of sound mind and memory at the time of the execution thereof, or that the same was not executed in the form and manner required by law; and therefore he insists that your orator has no right or title to the said premises, or any part of the same, but that on the death of the said C D the same descended unto the said E D, as heir-at-law of the said C D. Whereas, your orator charges the contrary of such pretenses to be true. Yet the said E D refuses to contest the validity of the said will during the life time of the subscribing witnesses thereto, and he threatens that he will hereafter dispute the validity of the said will when all the subscribing witnesses are dead, or gone out of the country, whereby your orator and his heirs and assigns will be deprived of the benefit of their testimony.

3. Your orator further represents, that the said E F and G H, the subscribing witnesses to the said last will and testament, are both aged and infirm, both being above the age of seventy years, and are not likely long to live, and your orator is in danger of being deprived of the benefit of their testimony in relation to the execution of said will, and the state of the mind and memory of the said C D, deceased.

Forasmuch, therefore, as your orator is without remedy in the premises, except in a court of equity, your orator prays:

I. That the said E D, who is made a party defendant to this bill, may be required to make full and direct answer to the same, and show why your orator should not have the testimony of the said witnesses, E F and G H, perpetuated.

II. That your orator may be at liberty to examine the said witnesses with respect to the execution and attestation of the said will, and the sanity of mind of the said C D at the time of the making of the same, so that their testimony may be perpetuated and preserved.

May it please, etc. (*Pray process as in No. 114, and add affidavit, as in No. 136 following.*)

No. 136. *Affidavit to be attached to bill to perpetuate testimony.*

STATE OF MICHIGAN, }
County of ——— } ss.

On this ——— day of ——— A. D. 18—, before me personally appeared the above named A B, and made oath that he has read the above and foregoing petition, subscribed by him (or heard it read), and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are stated therein to be on his information and belief, and that as to those matters he believes it to be true.

T F G,

Notary Public, ——— County, Michigan.

SECTION III.

DEFENSES AND PROCEEDINGS.

The defense to a bill to perpetuate testimony is the same as in other cases, by demurrer, plea or answer, according to the nature of the case. To a bill to prove a will, and to perpetuate testimony, the defendant may plead that he is a purchaser without notice of the will, and insist that if the complainant has a title, he may immediately proceed at law.¹

Demurrer.—A demurrer will seldom lie to a bill of this nature.² But if it clearly appears that the jurisdiction does not arise upon the case made by the bill, a demurrer will hold.³ As where specific allegations of the facts upon which the complainant claims the aid of the court are not made by the bill.⁴ So if a bill prays relief it will be demurrable.⁵ But it has been held that where relief and discovery prayed by

¹ *Bechinall v. Arnold*, 1 Vern. 554; Welf. Eq. Pl. 146; Beames on Pleas, 241; 2 Barb. Ch. Pr. 142.

² Mitf. Eq. Pl. 149; 2 Barb. Ch. Pr. 139, 142; Welf. Eq. Pl. 146; *Tirrell v. Cox*, 1 Rol. Abr. 383.

³ Mitf. Eq. Pl. 149, 150; 2 Barb. Ch. Pr. 142; Welf. Eq. Pl. 146.

⁴ *Lord North v. Lady Gray*, Dick. R. 14; *Angell v. Angell*, 1 Sim. & Stu. 89.

⁵ *Rose v. Gannell*, Atk. 439; *Dalton v. Thompson*, Dick. R. 98; *Jerome v. Jerome*, 5 Conn. 352.

the bill were both demurrable, the defendant could not demur to so much of the bill as sought to perpetuate testimony.¹

If the bill contains matters which may require very different decretal orders as to the publication of the testimony, it will be liable to demurrer.²

Answer.—An answer may be filed as in other cases. The complainant compels the defendant to answer, and the suit is proceeded with in the usual way, by filing a replication and issuing a commission for the examination of witnesses.³

If the cause should be improperly brought to a hearing, it will be dismissed. But the depositions taken will still be used as evidence, even though the bill is dismissed.⁴

A bill to perpetuate testimony is never brought to a hearing.⁵

In most of the States bills to perpetuate testimony are seldom resorted to at the present day. The statutes of the different States have generally given a much less expensive and more expeditious method of proceeding to accomplish the object.

SECTION IV.

PROCEEDINGS UNDER THE STATUTE.

By Public Act of 1895, No. 180, Sections 7459 to 7477, inclusive, of Howell's Statutes, relating to depositions to be used to perpetuate testimony, were repealed. The present statute relating thereto will be found in Section II, of Chapter XII of this work, entitled Testimony.⁶

¹ *Thorpe v. Macauley*, 5 Mad. 218; *Shackell v. Macauley*, 2 Sim. & Stu. 79.

² Story's Eq. Pl. § 306; *Vaughan v. Fitzgerald*, 1 Sch. & Lef. 316.

³ 1 Smith Ch. 365; Welf. Eq. Pl. 147; 2 Barb. Ch. Pr. 143.

⁴ *Hall v. Huddleston*, 2 P. Wms. R. 162, 163; *Anon.* 2 Ves. R. 497; *Anon.* Amb. R. 237; 2 Barb. Ch. Pr. 143.

⁵ *Vaughan v. Fitzgerald*, 1 Sch. & Lef. 316; 2 Barb. Ch. Pr. 143.

⁶ See page 159, *ante*.

CHAPTER XXV.

CROSS-BILLS.

Section 1. NATURE OF A CROSS-BILL.

2. FRAME OF BILL.
3. WHEN TO BE FILED.
4. PROCESS UPON.
5. DEFENSES TO.

SECTION I.

NATURE OF A CROSS-BILL.

A cross-bill implies a bill brought by a defendant in a suit against the complainant in the same suit, or against other defendants in the same suit or against both, touching the matters in question in the original bill.¹ It is of a mixed character, partaking partly of the character of an original bill, and partly of that of bills not original, and is generally considered a defense.²

Whenever it is necessary to bring all the equities of all the parties fully before the court, that even and complete equity may be done, as well in favor of the defendant as of the complainant, it becomes necessary to file a cross-bill; and this may be done by any or all the defendants against all or any of the complainants, or by a defendant against his co-defendants, or a part of them, as the nature of the case may require.³

Where the defendants rely on their answer alone, they can only use the equity of their case for the purpose of defense;

¹ Story's Eq. Pl. § 389; Welf. Eq. Pl. 229; Coop. Eq. Pl. 62; Mitf. Eq. Pl. 80.

² *Newbury v. Wren*, 1 Vern. 221; *Piggott v. Williams*, 6 Mad. 95; *Hilton v. Barrow*, 1 Ves. Jr. 284; *Parker v. Leigh*, 6 Mad. 115; Welf. Eq. Pl. 223.

³ *Ballance v. Underhill*, 3 Scam. 453; 1 Smith's Ch. Pr. 459; Mitf. Eq. Pl. 75, 76; *Crutchfield v. Patten*, 44 Geo. 65; *Gilmer v. Felhoun*, 45 Miss. 627; *Mercier v. Lewis*, 39 Cal. 532; *Erlinger v. Boul*, 7 Bradw. 41.

but if they wish to become the assailants, and seek affirmative relief, they must file their cross-bill; and in this way, and this alone, are they permitted to use their equity as a weapon of attack.¹

A cross-bill must be germane to the subject-matter of the original bill, and no foreign matter can be introduced.² And it can not contradict the allegations of the answer filed to the original bill.³

A cross-bill will not be entertained if the matter of it can be made available under the original bill.⁴

Whenever, in chancery, it becomes necessary to bring all the rights of all parties fully before the court, so that complete equity may be done, as well to the defendant as the complainant, resort must be had to a cross-bill. And while the allegations of the cross-bill must relate to the subject-matter in controversy in the original bill, they are not restricted to the issues in the original cause.⁵

Thus a cross-bill may be maintained for the purpose of obtaining an equitable set-off.⁶

Or to establish an agreement or conveyance which the original bill seeks to set aside.⁷

Or to compel the surrender or cancellation of a contract which the original bill seeks to specifically enforce.⁸

Or to set aside a void judgment, when the enforcement of such judgment is the subject-matter of the original bill.⁹

¹ *Andrews v. Kibbe*, 12 Mich. 94; *Caruthers v. Hall*, 10 Mich. 40; *Wisner v. Farnham*, 2 Mich. 472; *Dye v. Mann*, 10 Mich. 291; *Schwarz v. Sears*, Walk. Ch. 170; *Bank v. Bronson*, 14 Mich. 361; *Tarleton v. Vietes*, 1 Gilm. 470; *Fletcher v. Wilson*, 1 S. & M. Ch. 376; *Galatian v. Erwin*, Hopk. 48.

² *Andrews v. Kibbe*, 12 Mich. 94; *Hall v. Harrington*, 41 Mich. 146; *Lund v. Bank*, 96 Ill. 181; *Davis v. Christian Un.*, 100 Ill. 313; *Hurd v. Case*, 32 Ill. 45; *Jones v. Smith*, 14 Ill. 229; *Chicago Well Co. v. Life Ins. Co.*, 57 Ill. 424.

³ *Hudson v. Hudson*, 3 Rand. 117.

⁴ *Brown v. Bell*, 4 Hey. 287; *N. Y. Dry Dock Co. v. Ins. Co.*, 3 Sandf. Ch. 273; *Story's Eq. Pl.* § 389; *Morgan v. Smith*, 11 Ill. 195; *Purdy v. Henslee*, 97 Ill. 390; *Farwell v. Harding*, 96 Ill. 32.

⁵ *Follansbee v. Mort. Co.*, 7 Bradw. 486; *Nelson v. Dunn*, 15 Ala. 501. *Powers v. Hibbard*, 72 N. W. 344.

⁶ *Cartwright v. Clark*, 4 Metc. 104; *Derby v. Gage*, 38 Ill. 27.

⁷ *Carnochan v. Christie*, 11 Wheat. 446.

⁸ *Crosse v. DeValle*, 1 Wall. 5.

⁹ *Jones v. Smith*, 14 Ill. 229; *Hurd v. Case*, 32 Ill. 45.

And the fact that there may be a remedy at law, does not oust the court of equity of its jurisdiction.¹

If, however, a bill is for a certain purpose, the defendant can not, by any cross-bill, bring into litigation in that suit any causes of action which he may have against the complainant, unless there exist some special circumstances, such as insolvency, non-residence, etc., which would render it necessary in order to avoid irreparable injury. Thus, if a bill is filed for specific performance of a contract for land, the defendant can not, by way of cross-bill, bring into litigation a fraud practiced on him by the complainant in trading horses, or a debt due by the complainant, unconnected with the contract concerning the land sought to be enforced. The cross-bill must relate exclusively to the subject-matter of the original bill and things connected therewith, and foreign matters can not be introduced, unless under special circumstances.²

The necessity of a cross-bill for relief occurs when the defendant seeks relief in reference to the subject-matter of the original bill, as he can only obtain affirmative relief in that way.³ And if the matter of defense arises after the cause is at issue, or that the complainant has given a release, or that there has been an award made on a reference after issue joined, which at law may be pleaded *puis darrein* continuance, a defendant can not avail himself of either by plea or answer, and therefore must resort to a cross-bill.⁴

In a suit to enforce a claim of dower in lands against one holding the legal title, the defendant can not obtain affirma-

¹ *Ib.*; *Babcock v. McCamant*, 53 Ill. 215; *Robins v. Swain*, 68 Ill. 197.

² *Jossey v. Rogers*, 13 Geo. 478; *May v. Armstrong*, 3 J. J. M. 260; *Horner v. Hanks*, 22 Ark. 572; *Fletcher v. Wilson*, 1 Smed. & Marsh. Ch. 376; *McCarn v. Wilcox*, 106 Mich. 64.

³ *Vary v. Shea*, 36 Mich. 388; *Tarleton v. Vietes*, 1 Gilm. 470; *Bal-lance v. Underhill*, 3 Scam. 453; *Atkin v. Merrell*, 39 Ill. 63; *Stone v. Smoot*, 39 Ill. 409; *McCagg v. Hea-cock*, 42 Ill. 153; *Hanna v. Ratekin*,

43 Ill. 462; *Croskey v. Manuf. Co.*, 48 Ill. 481; *Titsworth v. Stout*, 49 Ill. 78; *Howett v. Selby*, 54 Ill. 151; *Carnochan v. Christie*, 11 Wheat. 446; *Cullum v. Erwin*, 4 Ala. 452; *Cloud v. Hamilton*, 3 Yerg. 81; *Schwarz v. Sears*, Walk. Ch. 170.

⁴ *Ferris v. McClure*, 36 Ill. 77; *Iglehart v. Crane*, 42 Ill. 262; *Taylor v. Titus*, 2 Edw. Ch. 135, *Barrington v. O'Brien*, 2 Ball & Beat. 140; see *Kelsey v. Hobby*, 16 Pet. 269; *Bank v. Sprague*, 21 N. J. Eq. 530.

tive relief upon an equitable lien upon the premises, except by means of a cross-bill.¹

When the scope of a bill to quiet title calls for the determination of the question of title between the parties, the defendant may assert his legal title by a cross-bill.²

A cross-bill is generally considered a defense;³ and the original cause and the cross-bill are but one cause.⁴ It is so effectually a defense, that if a cross-bill is taken as confessed, it may be used as evidence against the complainant in the original suit, on the hearing; and will have the same effect as if he had admitted the facts in an answer.⁵

New parties may be brought in by cross-bill, who were not parties to the original bill.⁶ And persons not made parties defendants in the original bill have no right to file a cross-bill; but where one is filed without objection by the complainant, who answers it, such bill will not be dismissed before the final hearing.⁷

A cross-bill can not be maintained where it rests upon the same facts as the original, and the original fails.⁸

Answer in nature of cross-bill.—Chan. Rule 11, which was first adopted as a rule of practice in 1884, provides that a defendant shall be at liberty by his answer to present the facts upon which his equity rests and to claim by such answer the benefit of a cross-bill. This rule gives a defendant all the benefits of a cross-bill upon an answer containing the proper averments and prayer, and is intended to supplant the practice of filing a formal cross-bill, by a simpler method.⁹

See ANSWERS IN NATURE OF CROSS-BILL, p. 121, *ante*.

SECTION II.

FRAME OF BILL.

Generally, a cross-bill should state the parties, prayer and objects of the original bill, the proceedings thereon, and the

¹ *Aiken v. Merrell*, 39 Ill. 63.

² *McKenzie v. Cook*, 71 N. W. 868.

³ *Newbury v. Wren*, 1 Verne, 221;
Field v. Schieffelin, 7 Johns. Ch. R. 252;
Galatian v. Erwin, Hopk. Ch. 48;
Sterl v. Sterl, 2 Bradw. 223.

⁴ *Field v. Schieffelin*, 7 Johns. Ch. R. 252.

⁵ *White v. Buloid*, 2 Paige Ch. 164; 2 Barb. Ch. Pr. 127; Story's Eq. Pl. § 399.

⁶ *Hurd v. Case*, 32 Ill. 45; *Jones v. Smith*, 14 Ill. 229.

⁷ *Payne v. Cowan*, 1 S. & M. Ch. 26.

⁸ *Abbott v. Abbott*, 41 Mich. 540.

⁹ *Coach v. Adsit*, 97 Mich. 563.

rights of the party exhibiting the bill, which are necessary to be made the subject of cross-litigation; or the ground on which he resists the claims of the complainant in the original bill, if that is the object of the new bill. A cross-bill should not introduce new and distinct matters, not embraced in the original suit; for as to such matters it is an original bill, and they can not properly be examined at the hearing of the first suit.¹ And it is said that a cross-bill need not, as against the complainant in the original bill, show any equity to support the jurisdiction.²

When the bill is brought by one defendant upon a question between two defendants, the complainant to the original bill must be a party.³

A cross-bill to have usurious securities delivered up, must offer to pay what is due.⁴

No. 137. Cross-bill to a foreclosure suit.

STATE OF MICHIGAN.

The Circuit Court for the County of ———. In Chancery.

To the Circuit Court for the County of ———. In Chancery.

1. Your orator, A B, of, etc., respectfully represents unto the court, that on, etc., C D, of, etc., one of the defendants hereinafter named, exhibited in this honorable court his bill of complaint, against one E F, of, etc., a defendant hereinafter named, and your orator, to foreclose a mortgage therein described, and thereby praying that an account may be taken in that behalf, and that the defendant, E F, be decreed to pay the said C D whatever sum should appear to be due to him, together with the costs of that proceeding, and that in default of such payment, the said mortgage property may be sold as directed by the court, to satisfy such debt and costs; and that in case of such sale and a failure to redeem therefrom pursuant to law, the said E F and your orator, the defendants to said bill, and all persons claiming through or under them, after the commencement of said proceeding, may be forever barred and foreclosed of all right or equity of redemption of the said mortgaged property; and that the said C D may have such other and further relief as equity may require and to the court

¹ *Andrews v. Kibbe*, 12 Mich. 94; *Story's Eq. Pl.* § 401; *Mitf. Pl.* 81; *Coop. Eq. Pl.* 88; *Welf. Eq. Pl.* 228; *May v. Armstrong*, Marsh. 262; *Galatian v. Erwin*, Hopk. 48; *Hurd v. Case*, 32 Ill. 45, 49; *Jones v. Smith*, 14 Ill. 229; *Fletcher v. Wilson*, 1 S. & M. Ch. 376; *Cross v. De Valle*, 1 Wall. U. S. 1.

² *Doble v. Potman*, Hardr. 160; *Burgess v. Wheate*, 1 Blacks. 132; *Mason v. Gardiner*, 4 Bro. C. C. 437; *Calverley v. Williams*, 1 Ves. Jr. 211, 213.

³ *Coop. Eq. Pl.* 85; *Welf. Eq. Pl.* 229; *Mitf. Eq. Pl.* 81.

⁴ *Mason v. Gardiner*, 4 Bro. C. C. 437.

shall seem meet; and your orator being duly served with process, appeared and put in his answer thereto, as by the said bill, and other pleadings and proceedings in the said cause, now remaining on file and of record in this honorable court, reference thereto being had, will more fully appear.

2. Your orator further represents unto the court that, on, etc., and prior to the date of the execution of the said mortgage from the said E F to this said C D, the said E F being indebted to your orator in the sum of — dollars, made and delivered to your orator his certain promissory note of that date, and thereby promised to pay your orator the said sum of — dollars, on, etc. (*describe the note*), as will appear by the said note, ready to be produced in court, and by a copy of the same hereto attached, and marked "Exhibit A," which is hereby made a part of this, your orator's cross-bill.

3. Your orator further represents, that to secure the payment of the principal sum and interest mentioned in said promissory note, the said E F, on, etc., by his mortgage deed of that date, conveyed to your orator, in fee simple, that certain parcel of land, with the appurtenances, in the said county of —. to wit. (*Here describe the mortgaged premises*) subject, however, to a condition of defeasance upon the payment of the principal sum and interest aforesaid, according to the tenor and effect of the said promissory note, which said mortgage deed was on, etc., duly acknowledged; and afterward (and before the execution and delivery of the mortgage deed to the said C D), on, etc., the said mortgage deed to your orator was duly filed for record in the recorder's office of the county of — aforesaid; as by the said mortgage deed and its accompanying certificates of acknowledgment and recording, ready to be produced in court, will more fully appear. A copy of the said mortgage deed and certificates, marked "Exhibit B," is hereto attached, and is hereby made a part of this bill.

4. Your orator further represents that the lien of your orator's said mortgage deed is superior and prior to that of the said C D; and that the said E F has not yet paid the said principal sum and interest, so due your orator, or any part thereof, although the same long since became due; by means whereof the said mortgaged premises have become forfeited, subject, nevertheless, to redemption in equity by the said E F and C D, or their assigns.

Forasmuch, therefore, as your orator is without remedy in the premises, except by filing this his cross-bill, in the said proceedings commenced by the said C D against your orator and the said E F, your orator prays :

I. That the said C D and E F, who are hereby made parties defendant to this cross-bill, may be required to make full and direct answer to the same, *but not under oath, the answer under oath being hereby waived.*

II. That an account may be taken by or under the direction of the court, of the amount due your orator upon said promissory note and mortgage deed.

III. That the defendant, E F, may be decreed to pay to your orator what ever sum shall appear to be due to him upon the taking of such account, together with the costs of this proceeding, by a short day to be fixed by the court.

IV. That in default of such payment the said mortgaged premises may be sold as this honorable court shall direct, to satisfy such debt and costs.

V. That in case of such sale, and on failure to redeem therefrom pur-

suant to law, that the defendants, and all persons claiming through or under them, after the commencement of this proceeding, may be forever barred and foreclosed of all right or equity of redemption of the said mortgaged premises.

VI. And that your orator may have still further and other relief in the premises as the nature of the case shall require and to this honorable court shall seem meet. (*Add prayer for process, and attach exhibits.*)

No. 138. Cross-bill in the nature of a plea puis darrein continuance.

STATE OF MICHIGAN.

The Circuit Court for the County of _____. In chancery.

To the Circuit Court for the County of _____. In chancery.

1. Your orator, A B, of, etc., respectfully represents unto the court, that on, etc., C D, of, etc., the defendant hereinafter named, filed his bill of complaint in this honorable court against your orator, thereby praying, etc. (*here state the prayer of bill*); and your orator, being duly served with process, appeared and put in his answer thereto, to which answer the said C D filed a replication; and issue being then joined, testimony was then taken on both sides, and the proof closed; whereupon the said cause was set down for hearing as by the said bill, and other pleadings and proceedings in the said cause, now remaining as of record in this honorable court, reference being thereto had, will more fully appear.

2. Your orator further represents, that the said cause has not yet been heard; and on, etc., the said C D, by a certain writing of release, of that date, did remise, release, and forever quit-claim unto your orator, his heirs, executors and administrators, the several matters and things complained of in and by the said bill of the said C D, and in question in the said suit, and each and every of them, and of all sums of money then due and owing, or thereafter to become due and owing, together with all, and all manner of actions, causes of action, suits, and demands whatsoever, both at law and in equity, or otherwise howsoever, which he, the said C D, then had, or which he should or might at any time or times thereafter have, claim, allege or demand against your orator, for, or by reason or means of any matter, cause or thing whatsoever, from the beginning of the world to the day of the date of the said deed or writing of release, as by the said release, reference thereunto being had, and a copy of the same hereto attached, marked "Exhibit A," and made a part of this bill, will more fully appear.

3. And your orator hoped that in consequence of the said release, the said C D would not have proceeded in the said suit against your orator; but the said C D, notwithstanding the said release, threatens and intends to proceed in the said suit, and to bring the same on for hearing in due course; and he pretends that no such release was ever executed by him, or if so, that the same was obtained by fraud and surprise, and therefore void. Whereas, your orator charges that the same was, in every respect, fairly and properly obtained by your orator, and duly executed by the said C D.

4. And your orator further represents, that under the circumstances aforesaid, he is unable to put the said release in issue, or to use the same as a plea in bar of the said suit.

Forasmuch, therefore, as your orator is without remedy in the premises, except in a court of equity, your orator prays :

I. That the said C D, who is made a party defendant to this cross-bill, may be required to make full and direct answer to the same, *but not under oath, the answer under oath being hereby waived*;

II. That the said release may be established and declared by this honorable court a sufficient bar to any further proceedings by the said C D in the said suit;

III. That the bill of the said C D therein may, under the circumstances, be forthwith dismissed with costs.

IV. And that your orator may have such other and further relief in the premises as equity may require and to this honorable court shall seem meet. (*Pray process and attach "Exhibit A."*)

SECTION III.

WHEN TO BE FILED.

The proper time for filing a cross-bill, when such a bill is necessary, is at the time of putting in the answer to the original bill, and before issue is joined by the filing of a replication.¹ As the matters of defense upon which a cross-bill is founded must be stated in the answer to the original bill, as well as in the cross-bill, it can seldom be necessary to delay the filing of the cross-bill till after the original cause is at issue.²

But the rule that a cross-bill should be filed at the same time with the answer, does not apply to such a bill by one defendant against a co-defendant, for the reason that, until the answers are filed, neither defendant can know what defense the other will set up.³

A defendant desiring to file a cross-bill should do so without delay, and have the same at issue, if practicable, so as to be heard with the original bill. If he desires further time, he must seek it as a matter of indulgence.⁴ The proceedings in the original suit will not be delayed, unless on the special order of court, founded upon notice of the application to the adverse party.⁵

¹ *Irving v. DeKay*, 10 Paige Ch. R. 319; *Wiley v. Platter*, 17 Ill. 540.

² 2 Barb. Ch. Pr. 129.

³ *Vanderveer v. Holcomb*, 21 N. J. Eq. 105; see *Berryman v. Graham*, 1b. 370.

⁴ *Beauchamp v. Putnam*, 34 Ill. 378; *Reed v. Kempf*, 16 Ill. 445; *Youngs v. Overseers, etc.*, 2 Green N. J. 521.

⁵ *Cartwright v. Clark*, 4 Met. 104; *Field v. Schieffelin*, 7 Johns. Ch. 250;

The defendant can not claim, as a matter of right, a continuance where the original cause is ripe for hearing, by filing a cross-bill, and having the same answered, without showing sufficient cause for delay.¹ To entitle him to a delay of the original proceedings, the cross-bill must be sworn to positively, either by the complainant thereto or by the person from whom his information of the facts was derived.²

The court itself will sometimes, in its discretion, where it appears that the suit is insufficient to bring before the court the rights of all the parties, and the matters necessary to a just determination of the cause, at the hearing, direct a cross-bill to be filed.³

Leave to file.—A defendant can not file a cross-bill before the original bill is answered.⁴ And then only upon leave obtained from the court for that purpose.⁵

In Illinois it is held that the filing of a cross-bill is a matter of right and requires no leave, but it does not necessarily stay the original cause;⁶ and this is the rule in Michigan.

SECTION IV.

PROCESS UPON.

Process should be prayed, issued and served as in original bills.

In Illinois the rule is different, for there by statute it is provided that "where it is necessary for the defendant to bring a new party before the court, he shall state it in his cross-bill; and a summons shall be issued, and other proceedings had, as in the case of other defendants." This was the rule independ-

White v. Buloid, 2 Paige Ch. 164;
Coleman v. Moore, 3 Litt. 355; *Beauchamp v. Putnam*, 34 Ill. 378.

¹ *Wiley v. Platter*, 17 Ill. 538; see *Reed v. Kempf*, 16 Ill. 448.

² *Talmage v. Pell*, 9 Paige Ch. 410; *Irving v. DeKay*, 10 Paige Ch. 319.

³ *Field v. Schieffelin*, 7 Johns. Ch. 250; *Latouche v. Dunsaney*, 1 Sch. &

Lef. 137; Story's Eq. Pl. § 396; Mitf. Eq. Pl. 82, 83.

⁴ *Allen v. Allen*, Hemp. 58.

⁵ *Bronson v. R. R. Co.*, 2 Wall. U. S. 283.

⁶ *Beauchamp v. Putnam*, 34 Ill. 378; *Jones v. Smith*, 14 Ill. 229; *Teleg. Co. v. Teleg. Co.*, 49 Ill. 90; *Davis v. Chris. Un.*, 100 Ill. 313.

ent of such statute and before its passage.' As against the parties to the original bill, no process is necessary.²

In Kentucky it is held that process must issue on the filing of the cross-bill, or the defendants are not bound to notice it.³

It is the duty of a party who files a cross-bill, to take steps to have it answered; and where no such steps are taken, and the parties voluntarily go to a hearing, the cross-bill may be regarded as abandoned.⁴

SECTION V.

DEFENSES TO.

Demurrer.—A demurrer for want of equity will not lie to a cross-bill filed by a defendant in a suit against the complainant in the same suit, touching the same matter. For being drawn into court by the complainant in the original bill, he may avail himself of the assistance of the court without being put to show a ground of equity to support its jurisdiction.⁵ Where a cross-bill seeks relief which is of an equitable nature, it should contain all proper allegations which confer an equitable title to such relief upon the party; otherwise it will be open to demurrer. Thus, where an original bill was filed to enforce a security, and the defendant filed a cross-bill to have the security delivered up as a usurious security, and the cross-bill did not offer to pay the sum really due, a demurrer was allowed.⁶

If a cross-bill is not confined to the matters in litigation in the original suit, but seeks to bring before the court other distinct matters and rights, it is no longer entitled to be deemed a cross-bill, but is an original suit, and, it seems, a demurrer would lie.⁷ So, if a cross-bill is filed contrary to the practice

¹ *Jones v. Smith*, 24 Ill. 229; *Hurd v. Case*, 32 Ill. 45.

² *Fleece v. Russell*, 13 Ill. 31.

³ *Miles v. Bacon*, 4 J. J. Marsh. 457; *Ward v. Davidson*, 2 Ib. 443; *Garner v. Beaty*, 7 Ib. 223; *Talbot v. McGhee*, 4 Monr. 375.

⁴ *Purdee v. Henslee*, 97 Ill. 389.

⁵ *Doble v. Potman*, Hardr. 160;

Coop. Eq. Pl. 81, 215; *Mitf. Eq. Pl.* 203; 2 *Barb. Ch. Pr.* 133.

⁶ *Mason v. Gardiner*, 4 Bro. C. C. 436; *Busfield v. Solomons*, 9 Ves. 84; *Hickson v. Aylward*, 3 Molloy, 1; *Welf. Eq. Pl.* 230; *Galatian v. Erwin*, Hopk. 48, 59; S. C., 8 Cowen, 561; *Tobey v. Foreman*, 79 Ill. 489.

⁷ *Welf. Eq. Pl.* 220; 2 *Barb. Ch. Pr.* 133.

of the court, and under circumstances in which a pure bill of this nature is not allowed, or if it seeks to bring into question facts which the party has admitted in his answer to the original bill, it is open to a demurrer.¹

Pleas.—A plea to the person of the complainant does not lie to a cross-bill, unless it is exhibited by a person incapable alone to institute a suit; nor does a plea to the jurisdiction to such a bill; for the defendant, by filing his original bill, has affirmed the sufficiency both of the person and the jurisdiction.² Neither can a cross-bill, though between the same parties, as an original suit, be met by a plea of a suit for the same object pending in a court of concurrent jurisdiction; thus, after a bill brought in the exchequer to foreclose a mortgage, it was held that a defendant may bring a bill in the court of chancery to redeem, and the pendency of the former suit is not pleadable.³

In all other respects cross-bills are liable to all the pleas in bar, to which original bills are liable; and the converse is equally true, that a cross-bill is not liable to any plea which will not hold to an original bill. And, as it seems that a defendant can not, by a cross-bill, compel the complainant in the original to make discovery of the defendant's title, the objection may be taken by plea; and it may also be insisted on by answer.⁴

Answer.—The rules relating to answers to original bills apply fully to answers to cross-bills. It is to be observed, however, that the complainant in the original bill has the right to the first answer, and may move to stay proceedings in the cross-suit until the original bill is answered.⁵ And the complainant in the original suit does not waive his right to an

¹ Story's Eq. Pl. § 628-633; Coop. Eq. Pl. 87; 2 Barb. Ch. Pr. 133; Welf. Eq. Pl. 230; *Berkley v. Ryder*, 2 Ves. 533, 537; 1 Mont. Eq. Pl. 328; *White v. Buloid*, 2 Paige Ch. R. 164; *Field v. Schieffelin*, 7 Johns. Ch. 250; *Holbrook v. Prettyman*, 44 Ill. 311.

² Welf. Eq. Pl. 229; Mitf. Eq. Pl. 200, 291; Coop. Eq. Pl. 304; Beames Pl. in Eq. 302, 303; 2 Barb. Ch. Pr. 132.

³ *Lord Newburg v. Wren*, 1 Vern. 220; 2 Dan. Ch. Pr. 148; Welf. Eq. Pl. 229.

⁴ *Bellwood v. Wetherell*, 1 Younge & Coll. 211; *Glegg v. Legh*, 1 Bligh, N. S. 302; *Cherry v. Legh*, Ib. 306; Welf. Eq. Pl. 230; 2 Barb. Ch. 132, 133.

⁵ *Harris v. Harris*, Tur. & Russ. 165; *Wigley v. Whitaker*, 1 Beavan, 349.

answer by obtaining an order for time to answer the cross-bill.¹

Where a cross-bill is filed without answering the original bill, which is lost, if the complainant answers the cross bill, without taking any steps to require an answer from the defendants, or to restore his bill, and allows the cause to proceed in this manner, he will waive the irregularity in the filing of the cross-bill, without first having answered.²

SECTION VI.

PROCEEDINGS UPON.

The complainant in the original suit is not compelled in any case to stay proceedings therein upon the filing of a cross-bill, except by a special order of the court. And it is not a matter of course for the court to stay the proceedings in the original suit, in any case except where the defendant in the cross-suit is in contempt for not answering.³ If the complainant in the cross-bill desires to have the proceedings in the original suit stayed, the cross-bill should be sworn to⁴ by some person who knows the facts.⁵

A final decree upon the filing of a cross-bill, granting the relief thereby sought, can not be rendered in the absence of an answer, unless steps have been taken to place the defendants in default.⁶

After both causes are at issue or in a situation to be heard, the complainant in the cross-suit may have an order that they be heard together. But the delay of the complainant in the cross suit will not be permitted to delay the hearing of the original cause.⁷

An order should be obtained, when both causes are ready, that they be brought on for hearing together.⁸

Where an original bill is dismissed for want of jurisdiction,

¹ 2 Barb. Ch. Pr. 134; see *Ramkissenseat v. Barker*, 1 Atk. 20.

² *Davis v. Hall*, 92 Ill. 85.

³ *White v. Buloid*, 2 Paige Ch. 164.

⁴ *Ib.*; 2 Barb. Ch. Pr. 134.

⁵ *Talbot v. Pell*, 9 Paige Ch. 410.

⁶ *Teleg. Co. v. Teleg. Co.*, 49 Ill. 90.

⁷ *White v. Buloid*, 2 Paige Ch. 164; *Blair v. Reeling*, 39 Ill. 600.

⁸ Barb Ch. Pr. 135; Hind's Pr. 54.

a cross-bill filed in the same cause must follow the fate of the original bill.¹

After the filing of a cross-bill by the defendant, it would be error for the court to dismiss the original bill on the complainant's motion;² but, under the practice, the complainant may at any time before decree rendered dismiss his bill unless a cross-bill has been filed.³

Must conform to original bill.—A cross-bill can be sustained only on matters growing out of the original bill, and embraced in it; and can only be filed in a case where the defendant could file an original bill to secure the same relief.⁴

¹ *Loomis v. Freer*, 4 Ill. App. (Bradw.) Ct. 547.

² *Flaherty v. McCormick*, 123 Ill. 525; 2 Dan. Ch. Pr. 927.

³ *Ib.*; *Purdy v. Henslee*, 97 Ill. 339; Story's Eq. Pl. Sec. 401; Mitf. Eq. Pl. 81; Coop. Eq. Pl. 88.

⁴ *Hackley v. Mack*, 60 Mich. 592;

Story's Eq. Pl. Sec. 631; 2 Barb. Ch. Pr. 131; *Andrews v. Kibbe*, 13 Mich. 96; *Bank v. Bronson*, 14 Mich. 361, 372; *Gage v. Mayer*, 117 Ill. 633; *Parker v. Shannon*, 114 Ill. 192; *Davis v. Christian Union*, 100 Ill. 313.

CHAPTER XXVI.

BILLS FOR SPECIFIC PERFORMANCE.

Section 1. NATURE OF, AND WHEN PROPER.

2. PARTIES TO.
3. FRAME OF BILL.
4. DECREE.

SECTION I.

NATURE OF, AND WHEN PROPER.

Requisites of contract.—The essential conditions of a contract which will be specifically enforced in a court of equity are, that the contract must be made between competent parties; it must be entered into willingly; the terms must be understood by the parties, and be certain and defined; the consideration must be valuable; there must be mutuality of consideration and remedy; it must be properly proved; the party seeking its performance must fulfill his obligations under it; it must be such as the court can enforce; it must be one proper to be executed; it must be one on which there is not an adequate remedy at law; it must not be an unreasonable contract, on which there might be a remedy at law; and the conduct of the party seeking the performance must have been correct.¹ It must be fair, reasonable and just.* A court of equity will often refuse to enforce a contract which it

¹ See *Rust v. Conrad*, 47 Mich. 449; *Batten on Spec. Perf. of Cont.*; see *Taylor v. Merrill*, 55 Ill. 52; *Fitch v. Boyd*, Id. 307; *Fleming v. Carter*, 87 Ill. 565; *Hanley v. Sheldon*, Har. Ch. 420; *Magnard v. Brown*, 41 Mich. 298; *Smith v. Lawrence*, 15 Mich. 499; *Picard v. McCormick*, 11 Mich. 68; *Blanchard v. R. R. Co.*, 31 Mich.

44; *Long v. Long*, 118 Ill. 638; *Wolfe v. Bradberry*, 140 Ill. 578; *R. I. Ry. v. Dimick*, 144 Ill. 628; *Clipson v. Villars*, 151 Ill. 165; *Winter v. Trainor*, Ibid. 191; *Batcheller v. Batcheller*, 144 Ill. 471; *P. S. C. Co. v. Stable Car Line*, 142 Ill. 315.

² *Gould v. Banking Co.*, 136 Ill. 67; *Shaw v. Shoonover*, 130 Ill. 456.

would also refuse to annul, and will leave the parties to their remedy at law.¹

The contract must be established by competent proofs to be clear, definite and unequivocal in its terms, and not vague and uncertain in any of its essential particulars.²

Contracts that are so vague in their terms that no one but the parties can say how great an expenditure they contemplated, can not be specifically enforced in a court of equity; but must rest on the honor or good faith of the parties.³

The contract must be free from fraud or surprise, and fair and just in all its parts, or the complainant will be left to his remedy at law.⁴ And a performance will not be decreed on an imperfect, inchoate, or hard bargain,⁵ or if change of circumstances or lapse of time make it unconscionable.⁶ There must also be mutuality and reciprocity of obligation.⁷

Discretionary with court.—A specific performance rests in the sound discretion of the court, under all the circumstances of the particular case;⁸ and it is not decreed where there has

¹ *Jackson v. Ashton*, 11 Pet. 229; *Seymour v. Delaney*, 6 Johns. Ch. R. 222; *Clitherall v. Ogilvie*, 1 Dessau. 250; *Barksdale v. Payne*, Riley Ch. 174; *Gasque v. Small*, 2 Strobh. Eq. 72; *Henderson v. Hays*, 2 Watts, 148; *Munch v. Schabel*, 37 Mich. 166.

² *Clark v. Clark*, 122 Ill. 388; *Colson v. Thompson*, 2 Wheat. 336; *Carr v. Duval*, 14 Pet. 77; *Prater v. Miller*, 3 Hawks, 628; *Montgomery v. Norris*, 1 How. Miss. 499; *Waters v. Brown*, 7 J. J. Marsh. 133; *Fitzpatrick v. Beatty*, 1 Gilm. 454; *Pigge v. Corden*, 12 Leigh, 69; *Millard v. Ramsdell*, Harring. Ch. 373; *Bomier v. Caldwell*, 8 Mich. 463; *Wilson v. Wilson*, 6 Mich. 9; *McMurtrie v. Bennett*, Har. Ch. 124; *Brix v. Ott*, 101 Ill. 70; *Harrington v. Holcomb*, 75 Mich. 535; *Dunton v. Oathouse*, 64 Mich. 419.

³ *Bumpus v. Bumpus*, 53 Mich. 346; *Gates v. Gamble*, Ib. 181; *Green v. Begole*, 70 Mich. 602.

⁴ *Seymour v. Delancey*, 3 Cow. 445; *Griffith v. Frederick Co. Bank*, 6

Gill & J. 424; *Borten v. Sheffer*, 21 Gratt. Va. 474; *Modesett v. Johnson*, 2 Blackf. 431; *Johnson v. Dodge*, 17 Ill. 433; *Lear v. Choteau*, 23 Ill. 32; *Boomer v. Cunningham*, 22 Ill. 320; *Taylor v. Merrill*, 55 Ill. 52; *Lee v. Kirby*, 104 Mass. 420; *Ryan v. Ryan*, 97 Ill. 38; *Tamm v. Lavalle*, 92 Ill. 264; *Hicks v. Turck*, 83 Mich. 214; *Munro v. Edwards*, 86 Mich. 91; *Ry. Co. v. Reno*, 113 Ill. 39; *Dinkleman v. Gilbert*, 140 Ill. 597.

⁵ *Ohio v. Baum*, 6 Ham. 383; *McClellan v. Darrah*, 50 Ill. 249; *Hatch v. Kizer*, 140 Ill. 583; *Ry. Co. v. Reno*, 113 Ill. 44.

⁶ *Harrison v. Polar*, 116 Ill. 282.

⁷ *McMurtrie v. Bennett*, Harring. Ch. 124; *Hawley v. Sheldon*, Ib. 420; *Hutchenson v. McNutt*, 1 Ham. 14; *Cabeen v. Gordon*, 1 Hill. Ch. 51; *Benedict v. Lynch*, 1 Johns. Ch. R. 370; *Ohio v. Baum*, 6 Ham. 383; *Murble Co. v. Ripley*, 10 Wallace, 339; *Ewins v. Gordon*, 49 N. H. 444.

⁸ *McMurtrie v. Bennett*, Har. Ch. 124; *Smith v. Lawrence*, 15 Mich.

been long delay, or *lashes*, or a material change of circumstances.² The discretion of the court is not, however, an arbitrary one, but is regulated by rules and principles.³

When will be enforced.—It is a well settled rule that equity will not interfere in cases of contract, and decree specific performance, unless it can be done mutually and completely.⁴

A party seeking the specific performance of a contract for the sale and conveyance of a tract of land, can not excuse himself for not tendering the purchase money when due, upon the ground that the vendor has conveyed the land to a third person.⁵

A party can not compel the specific performance of a contract, unless he shows that he himself has specifically performed, or can justly account for the reason of his non-performance.⁶ He must show that he has not been in fault, but has taken all proper steps toward the performance on his part, and has been ready, desirous and prompt, to perform.⁷

499; *Chambers v. Livermore*, 15 Mich. 381; *McComas v. Easley*, 21 Gratt. (Va.) 23; *Wynn v. Smith*, 40 Geo. 457; *Race v. Weston*, 83 Ill. 91; *McCormick v. Sage*, 87 Ill. 484; *Kerfoot v. Breckenridge*, 87 Ill. 205; *Hicks v. Turck*, 72 Mich. 311.

² *Pigg v. Corder*, 12 Leigh, 69; *Rector v. Rector*, 3 Gilm. 105; *Milnor v. Willard*, 34 Ill. 38; *Hough v. Coughlan*, 41 Ill. 130; *Thompson v. Bruen*, 46 Ill. 125; *Fitch v. Boyd*, 55 Ill. 307; *Iglehart v. Gibson*, 56 Ill. 81; *Holt v. Rogers*, 8 Pet. 420; *Houghton v. Murphy*, 21 N. J. Eq. 118; *Harkness v. Underhill*, 1 Black. 316; *Johns v. Norris*, 23 N. J. Eq. 102; *Norris v. Knox*, 1 Pittsb. Pa. R. 56; *Beach v. Dyer*, 93 Ill. 296.

³ *Griffith v. Bank*, 6 Gill & J., 424; *Quinn v. Roath*, 37 Conn. 16; *Meeker v. Meeker*, 16 Conn. 403; *Seymour v. Delancey*, 3 Cow. 445; S. C. Johns. Ch. R. 222; *King v. Morford*, Saxton. 274; *Anthony v. Leftwick*, 3 Rand. 239; *Prater v. Miller*, 3 Hawks, 629; *Turner v. Clay*, 3 Bibb. 52; *Frisbie v. Ballance*, 4 Scam. 287;

Broadwell v. Broadwell, 1 Gilm. 599; *Dougherty v. Hampston*, 2 Blackf. 273; *Leigh v. Crump*, 1 Ired. Ch. 299; *Gould v. Womack*, 2 Ala. 83; *Hester v. Hooker*, 7 S. & M. 768; *Tobey v. County*, 3 Story, 800; *Clement v. Reid*, 9 S. & M. 535; *Tyson v. Watts*, 1 Md. Ch. Decis. 13; *Manuf. Co. v. Gough*, 2 Bradw. 477; *Allen v. Woodruff*, 96 Ill. 11.

⁴ *Pingle v. Connor*, 66 Mich. 187.

⁵ *Doyle v. Teas*, 4 Scam. 202; see *Shortall v. Mitchell*, 57 Ill. 161.

⁶ *Scott v. Shepherd*, 3 Gilm. 483; *Brown v. Cannon*, 5 Gilm. 174; *Warren v. Richmond*, 53 Ill. 52; *Watts v. Waddle*, 6 Pet. 389; *Greenup v. Strong*, 1 Bibb. 590; *Bearden v. Wood*, 1 A. K. Marsh. 450; *Logan v. McChord*, Id. 224; *Moore v. Skidmore*, 6 Litt. 453; *Clay v. Turner*, 3 Bibb. 52; *Iglehart v. Gibson*, 56 Ill. 81; *Crane v. Decamp*, 21 N. J. Eq. 414; *Howe v. Rogers*, 32 Texas, 218.

⁷ *Rogers v. Saunders*, 16 Maine, 92; *Brown v. Haines*, 12 Ohio, 1; *Doyle v. Teas*, 4 Scam. 202; *Kendall v. Almy*, 2 Sumner, 278.

If one party has been in default, and specific execution would be injurious to the other party, it will not be decreed.¹ But a failure to perform a merely nugatory act, is not material.²

Where, pursuant to an agreement for the exchange of lands, deeds have been executed and deposited in escrow, equity will enforce a specific performance of the contract at the suit of a party who has complied with the conditions upon which the deeds were deposited.³

In an ordinary contract for the sale of land, where credit is given, and a conveyance is to be made on the payment of the last installment, where time is not expressly the essence of the contract, a court of chancery may, in its discretion, enforce the performance of such a contract, although the payments may not have been promptly made. But in so doing the court will inquire into all the circumstances attending the delay, and the conduct of the parties.⁴ Chancery has no power to enforce a specific execution of a contract contrary to the clearly expressed intention of the parties.⁵

Where a party has so far performed his part of the contract that he can not be put *in statu quo*, he is entitled to a specific performance, and it is not necessary to show a literal performance on his part, unless such performance goes to the essence of the contract.⁶

Where specific performance has become impossible, as from a subsequent sale of the subject-matter of it, without notice, courts of equity will not decree a specific performance, though the bill may perhaps be retained for awarding compensation in damages.⁷

Specific performance will be denied when it appears that the

¹ *Vail v. Nelson*, 4 Rand, 478; *Brashier v. Gratz*, 6 Wheat. 528; see *Taylor v. Longworth*, 14 Pet. 172; *Ahl v. Johnson*, 20 How. (U. S.) 511.

² *Coale v. Barney*, 1 Gil! & J. 324.

³ *Bowman v. Gork*, 106 Mich. 163.

⁴ *Glover v. Fisher*, 11 Ill. 666; *Murphy v. Lockwood*, 21 Ill. 615; *Snyder v. Spaulding*, 57 Ill. 480; *Mason v. Wallace*, 3 McLean, 148; S. C., 4 McLean, 77; *Beach v. Dyer*, 93 Ill. 296; *Allen v. Woodruff*, 96 Ill. 12; *Marshall v. Peck*, 91 Ill. 187.

⁵ *Kemp v. Humphreys*, 18 Ill. 573; *Stowe v. Robinson*, 24 Ill. 532.

⁶ *McCurkle v. Brown*, 9 S. & M. 167; *Voorhees v. De Meyer*, 2 Barb. R. 37; *Shaw v. Livermore*, 2 Green (N. J.) Ch. 338.

⁷ *Woodward v. Harris*, 2 Barb. R. 439; *Buttrick v. Holden*, 18 Met. 355; see *Oliver v. Crosswell*, 42 Ill. 41; *Fallon v. Railroad Co.*, 1 Dillon, 121; see *Wallace v. McLaughlin*, 57 Ill. 53.

defendant has placed it beyond his power to specifically perform it, by sales and assignments to other parties who are not purchasers with notice of such contract, and who are not brought before the court.¹

Specific performance will not be decreed, at the instance of the vendor, unless his ability to make title be unquestionable² to all the lands contracted for.³ And a court of equity will not force a doubtful title on a purchaser.⁴

A court of equity will not decree the specific performance of a contract, the consideration of which is a wager upon an election.⁵

Upon principles of natural justice, a person ought not to be compelled to part with his title to land until he has received the amount which he had contracted to take for it, nor should a person receive a title until he has paid what he agreed to pay for it.⁶

Where a party has failed without sufficient excuse to execute his part of the contract, and there has been no acquiescence in the delay by the other party, the court will not decree specific performance. But if one party has been prevented, by any good cause, from performing his part of the agreement at the stipulated time, and the other party has suffered no material injury by the delay, the court will not refuse its aid.⁷

Before a vendor can declare a forfeiture he must be able to tender a deed in accordance with his bond.⁸

If, from the vendor's negligence or default, the property becomes encumbered by judgments, taxes, forfeitures or otherwise, before the time for conveying the same, or before he

¹ *Woolensak v. Briggs*, 119 Ill. 453; *Same v. Ferris*, 145 Ill. 1; see *Haines v. Haines*, 69 Mich. 581.

² *Garnett v. Mason*, 2 Brockenbrough's R. 183; S. C., 6 Call, 308; *Morgan v. Morgan*, 2 Wheat. 290; *Bank v. Hagner*, 1 Pet. 455.

³ *Hepburn v. Auld*, 5 Cranch, 262.

⁴ *Watts v. Waddle*, 6 Pet. 389; S. C., 1 McLean, 200; *Soheir v. Williams*, 1 Curtis, 479.

⁵ *McClurken v. Detrich*, 33 Ill. 349.

⁶ *Allison v. Clark*, Breese, 348; *Doyle v. Teas*, 4 Scam. 202; *Ishmeal v. Parker*, 13 Ill. 324.

⁷ *Longworth v. Taylor*, 1 McLean, 395; *White v. Law*, 7 Vt. 357; *Cleveland v. Benton*, 11 Vt. 138; *Goodell v. Field*, 15 Vt. 448; *Hatch v. Cobb*, 4 Johns. Ch. R. 559; *Lewis v. Woods*, 4 How. (Miss.) 86; *Russell v. Nester*, 46 Mich. 290.

⁸ *Baker v. Bishop*, 45 Ill. 264; *Mix v. Beach*, 46 Ill. 311; but see *Boston v. Nichols*, 47 Ill. 353.

offers to perform his contract, he can not insist on performance by the other party until he relieves the title from such subsequent incumbrances.¹

The right of a purchaser of land from two joint owners, to have a specific performance of the contract can not be impaired by reason merely that one of the vendors has failed to comply with an agreement with the other in respect to the subject-matter of the contract.²

The fact that damages may be recovered at law, is no reason, of itself, why performance should not be decreed;³ nor is the commencement of a suit at law, of itself, a bar.⁴ Performance may be decreed, in a proper case, where the party has lost his remedy at law.⁵ But specific performance of a contract will not be decreed, where the law would not allow damages.⁶

In application for specific performance of agreement, it is immaterial what the form of the instrument is, whether it is a covenant or a penal bond, with a condition to do the thing.⁷

Contracts relating to personalty and personal services.—Although courts of equity will enforce specifically, contracts relating to personalty, in many cases, yet they will weigh with greater nicety contracts of this description than such as relate to lands.⁸ And if a breach of a contract relating to personal property may be compensated by damages, equity will not, as a general rule, interfere.⁹ The transfer of stock will not always be decreed.¹⁰ Though a contract for in-

¹ *Cooper v. Tyler*, 46 Ill. 462; see *Brown v. Cannon*, 5 Gilm. 174.

² *Harding v. Parshall*, 56 Ill. 219.

³ *Washburn v. Dewey*, 17 Vt. 92.

⁴ *Brush v. Vandenberg*, 1 Edw., Ch. 21.

⁵ *Rogers v. Saunders*, 16 Maine, 92.

⁶ *Allen v. Beal*, 3 A. K. Marsh. 554; see, however, *Getchell v. Jewett*, 3 Greenl. 350.

⁷ *Broadwell v. Broadwell*, 1 Gilm. 470.

⁸ *Mechanic's Bank v. Seaton*, 1 Pet. 299.

⁹ *Cowles v. Whitman*, 10 Conn. 121; *Hoy v. Hansborough*, 1 Freeman. Ch. 523; *Caldwell v. Myers*, Hardin, 551; *Phillips v. Berger*, 2 Barb. R. 608; *Savery v. Spence*, 13 Ala. 561; *Sullivan v. Tuck*, 1 Md. Ch. Decis. 59; *Waters v. Howard*, Id. 112; *Roundtree v. McLain*, 1 Hemp. 245; *The Justices v. Croft*, 18 Geo. 473.

¹⁰ *Ferguson v. Paschall*, 11 Miss. 267; *Ross v. Union Pacific R. R. Co.* 1 Wool. 26.

surance, or for the delivery of a policy of insurance by the company, will be enforced, even after a loss.¹

An agreement to sing at concerts will not be specifically enforced.² And a husband will not be compelled, specifically, to perform an agreement to procure his wife to join him in a conveyance of real estate.³ And where a wife refuses to execute a contract by her husband and herself, to convey her land, he will not be compelled to convey his wife's estate to the purchaser, to make compensation for the principal estate.⁴

The specific performance of a mere voluntary agreement will not be enforced;⁵ a voluntary settlement will, however, be enforced, at the instance of a child, against the heir, if the former have the preferable equity;⁶ and it has been held that a voluntary agreement, if executed, would be aided in equity.⁷

A contract to build a railroad will not be enforced in equity.⁸

A contract to build a hotel, at joint risk and expense, was enforced, where one of the parties had performed his part of the contract.⁹

A specific performance of a contract, to indemnify against a pecuniary liability, may be enforced.¹⁰

Lost instrument.—A specific performance of a contract for the sale of land will be decreed, although the contract may be lost, on showing clearly the loss of it, and its contents.¹¹

Of an award.—The performance of an award will be enforced, on the ground that such performance is an execution of the agreement of the parties, as fixed by the arbitrators.¹² But the enforcement of an award for the payment of

¹ *Taylor v. Ins. Co.*, 9 How. U. S. 390; see *Carpenter v. Ins. Co.*, 4 Sandf. Ch. 408; *Ins. Co. v. Ins. Co.*, 19 How. U. S. 318; S. C., 2 Curtis, C. C. R. 524.

² *Sanquirico v. Benedetti*, 1 Barb. 315.

³ *Clark v. Savier*, 7 Watts, 107; *Weed v. Terry*, 2 Dwig. 341.

⁴ *Clark v. Reins*, 12 Gratt. Va. 98.

⁵ *Shepherd v. Shepherd*, 1 Md. Ch. Decis. 244; *Vasser v. Vasser*, 23

Miss. 378; *Boze v. Davis*, 14 Texas, 331.

⁶ *Haines v. Haines*, 6 Md. 435.

⁷ *Read v. Long*, 4 Yerg. 68.

⁸ *Ross v. R. R. Co.* 1 Wool. 26; *Fulton v. Railroad Co.*, 1 Dillon, 121.

⁹ *Berchett v. Bolling*, 5 Munf. 462.

¹⁰ *Chamberlain v. Blue*, 6 Blackf. 491; see *Robinson v. Cathcart*, 2 Cranch C. C. 590.

¹¹ *Gowkoski v. Day*, 16 Ill. 259.

¹² *McNeil v. Magee*, 5 Mason, 244;

money has been refused;¹ although where some other specific act is prescribed by the award, its performance will be enforced.²

Specific performance of an agreement to refer a disputed matter to arbitrators, can not be decreed;³ although it has been held that submission by adult heirs, of an equitable claim to land, of which their ancestor died seized, may be enforced.⁴

Mining contracts.—Any person, now or hereafter, holding an agreement for an interest in any mining lease, or license from the lessee, shall have an absolute right to have the same specifically enforced in chancery, if not in default himself.⁵

Parol contracts.—The specific performance of a parol contract for the conveyance of land will be enforced where the consideration has been paid, and the purchaser has taken possession;⁶ or where the vendee has paid part of the consideration, and taken possession and made valuable improvements, and tendered the balance of the purchase money before the expiration of the contract, though the vendor has sold the land to second vendee.⁷ But part payment is not of itself sufficient.⁸ And if the party can be amply recompensed pecuniarily, specific performance will be denied.⁹

To entitle a party to a specific performance of a verbal agreement, the proofs must clearly establish a contract, and

Ballance v. Underhill, 3 Scam. 453;

Jones v. Mill Creek, 4 Pick. 507;

Cook v. Vick, 2 How. Miss. R. 882.

¹ *Turpin v. Bouton*, Hardin, 312.

² *Story v. R. R. Co.*, 24 Conn. 94;

Kirksey v. Fike, 27 Ala. 383.

³ *Copper v. Wells*, Saxon, 10;

Tobey v. County of Bristol, 3 Story,

800; *Conner v. Drake*, 1 Ohio State R. 166.

⁴ *Boyd v. Magruder*, 2 Rob. Va. 76.

⁵ How. Stat. § 6613.

⁶ *Weed v. Terry*, Walk. Ch. 501;

Weed v. Terry, 2 Doug. 344; *Twiss*

v. George, 33 Mich. 253; *Murphy v.*

Steever, 47 Mich. 522; see Comp. L.

1871, § 4696; *Ramsey v. Liston*, 25

Ill. 114; *Gibbs v. Blackwell*, 37 Ill.

191; *Clayton v. Frazier*, 33 Texas,

91; *Langston v. Bates*, 84 Ill. 524;

Canham v. Mooney, 73 Mich. 184;

Putnam v. Tinkler, 83 Mich. 628.

¹ *Burtch v. Hogge*, Har. Ch. 31;

Bornier v. Caldwell, Har. Ch. 65;

Bornier v. Caldwell, 8 Mich. 463;

Norris v. Shonerman, 2 Doug. 16;

McMurtrie v. Bennett, Har. Ch. 124;

Milliard v. Ramsdell, Har. Ch. 173;

Blunt v. Tomlin, 27 Ill. 98; *Keys v.*

Test, 33 Ill. 316; see *DeWolf v.*

Pratt, 42 Ill. 198; *Chambers v.*

Roue, 36 Ill. 171; see *Harsha v.*

Reid, 45 N. Y. 415; *Howe v. Rogers*,

32 Texas, 218; *Freeman v. Freeman*,

43 N. Y. 34; *Atkinson v. Tanner*,

68 Ill. 247; *Ramsey v. Liston*, 25 Ill.

114; *Deniston v. Hoagland*, 67 Ill.

266.

⁸ *Scott v. Bush*, 26 Mich. 418.

⁹ *Webster v. Gray*, 37 Mich. 37.

all its terms and conditions, and that the purchaser has relied upon and performed his part of the agreement, and that it has been so far performed as to take it out of the statute of frauds, and the contract must be proved substantially as set forth in the bill, before a decree will be granted.¹

Acts must be shown unequivocally referring to and resulting from the agreement and done with a direct view to its performance.²

A parol contract by a father to convey to his son, on condition of his taking possession and making improvements, on a proper and clear case shown, will be enforced.³

When a daughter and her husband, pursuant to her father's verbal agreement to give her a house and lot in consideration of a life support for her mother and himself, remove from their home in another city, and enter into the occupancy with her parents of the premises, and care for the mother until her death, and for the father until his remarriage, and make improvements and pay taxes on the premises, and pay the remainder of the purchase price, there is a sufficient performance of the contract to take it out of the operation of the statute of frauds.⁴

A parol agreement to convey land in consideration of the marriage of the grantee is not taken out of the statute of frauds by such marriage.⁵

¹ *Wilson v. Wilson*, 6 Mich. 8; *Wales v. Newbould*, 9 Mich. 45; *Deckham v. Buffam*, 11 Mich. 529; *Wurcherer v. Hewitt*, 10 Mich. 453; *Covell v. Cole*, 16 Mich. 223; *Munsell v. Green*, 21 Mich. 491; *Harwood v. Underwood*, 28 Mich. 427; *Mundy v. Foster*, 31 Mich. 313; *Ford v. Loomis*, 33 Mich. 121; *Ritson v. Dodge*, 33 Mich. 463; *Stickney v. Parmenter*, 35 Mich. 237; *Putnam v. Tinkler*, 33 Mich. 628; *Hawkins v. Hunt*, 14 Ill. 42; *Peckham v. Barker*, 8 R. I. 17; *Welch v. Bayard*, 21 N. J. Eq. 186; *Hedrick v. Hern*, 4 W. Va. 620; *Albertson v. Ashton*, 102 Ill. 50.

² *Sullivan v. Estate*, 98 Mich. 570.

³ *Bohanan v. Bohanan*, 96 Ill. 591; *McDowell v. Lucas*, 97 Ill. 489; *Langston v. Bates*, 84 Ill. 524; see *Bright v. Bright*, 41 Ill. 97; *Neale v. Neale*, 9 Wallace, 1; *Galbraith v. Galbraith*, 5 Kansas, 402; *Kurtz v. Hibner*, 55 Ill. 514; *Irwin v. Drake*, 114 Ill. 302; *Russell v. Russell*, 94 Mich. 122; *Briggs v. Briggs*, 71 N. W. Rep. 632; *Welch v. Whelpley*, 62 Mich. 16; *Ingersoll v. Horton*, 7 Mich. 405; *Taft v. Taft*, 73 Mich. 502.

⁴ *Lloyd v. Hollenback*, 98 Mich. 203; *Carr v. McCarthy*, 70 Mich. 258; *Kelsey v. McDonald*, 76 Mich. 184.

⁵ *Welch v. Whelpley*, 62 Mich. 16.

An agreement to execute a mortgage upon real estate, is an agreement concerning an interest in lands, which, to be valid, must be in writing, or evidenced by some note or memorandum thereof, signed by the promisor. So, where one party signs a memorandum offering to exchange land which he owns for land owned by another party, such memorandum can not be made a valid contract by the verbal acceptance and promise of the other party to make such exchange; such verbal promise not being enforceable, being required to be in writing by the statute of frauds.¹

It has frequently been held in Michigan, that a contract void under the statute of frauds is a mere nullity and can not be used for any purpose whatever.²

The mere doing of some work and furnishing some building material, by the complainant for the defendant, pursuant to the parol contract, is not sufficient part performance to take the case out of the statute of frauds.³

Payment of consideration for land sold under a verbal agreement will not always take the case out of the statute of frauds; nor will possession when the purchaser, as a tenant in common, merely remains in possession. Acts done as owner, and in reliance upon ownership, and for which damages will not be adequate compensation, are also necessary to entitle a party to the enforcement of such an agreement.⁴

Laches.—Although great lapse of time will not be a bar where the complainant has been in no default, and has been reasonably active during the whole time in asserting his rights and endeavoring to enforce performance,⁵ yet, where no effort had been made by a vendee in his lifetime, nor by his heirs after his death, until twenty-nine years had elapsed, and the land had risen in value, and other circumstances had occurred, the

¹ *Wardell v. Williams*, 63 Mich. 50.

² *Id.*; *Chamberlain v. Dow*, 10 Mich. 319; *Hall v. Soule*, 11 Mich. 494; *Holland v. Hoyt*, 14 Mich. 238; *Grimes v. Van Vechten*, 20 Mich. 410; *Hillebrands v. Hibbelink*, 40 Mich. 646; *Sutton v. Rowley*, 44 Mich. 112; see *Cloud v. Greasley*, 125 Ill. 313.

³ *Cloud v. Greasley*, 125 Ill. 319;

Cronk v. Trumbull, 66 Ill. 428; *Padfield v. Padfield*, 92 Ill. 198; *Langston v. Bates*, 84 Ill. 524; *Pickerell v. Morss*, 97 Ill. 220; Fry on Specific Performance, § 390.

⁴ *Peckham v. Balch*, 49 Mich. 179.

⁵ *Coulson v. Walton*, 9 Pet. 62; *Gibson v. Hoag*, 95 Ill. 46; *Marshall v. Perry*, 90 Ill. 289.

lapse of time was held a conclusive bar.¹ On the general subject of delay, the cases cited in the note below, are important.²

A parol agreement for the conveyance of land should never be enforced in equity, unless it is satisfactorily proved; and there are important acts of part performance, raising strong equity in the complainant's favor; and as time destroys evidence, great delay in filing a bill for the specific performance of such an agreement, even if delay is excused, will necessitate a close scrutiny of the proofs. But *laches* in filing a bill is not imputed to a minor or to a person not competent to act in his own behalf.³

Delay in performance.—Suit for specific performance can not be maintained where complainant has not within a reasonable time accepted defendant's offer to sell the land in question, and performed the conditions of such offer.⁴

Vendor against purchaser or his assignee.—A vendor may have a specific performance of a contract for the sale of land decreed against his vendee. The remedy is mutual, and may be availed of by either the vendor or vendee. It lies in favor of the personal representatives of a deceased vendor, and against subsequent purchasers or assignee of the vendee, taking with notice.⁵

The remedy against an assignee of the vendee is in the

¹ *Holt v. Rogers*, 8 Pet. 420.

² *Pratt v. Carroll*, 8 Cranch, 471; *Williams v. Mattocks*, 3 Vt. 189; *Miller v. Bear*, 3 Paige Ch. R. 466; *Waters v. Travis*, 9 Johns. R. 450; *Jackson v. Edwards*, 22 Wend. 498; *Smedley v. Moore*, 26 Wend. 238; *Bridge v. Vreeland*, 3 Green Ch. 157; *Haffner v. Dickson*, 2 Har. & J. 46; *Richardson v. Baker*, 5 Call. 514; *Williams v. Lavis*, 5 Leigh, 686; *McGalliard v. Aiken*, 2 Ired. Ch. 186; *Falls v. Carpenter*, 1 Dev. & Bat. Ch. 237; *Strickland v. Fowler*, Id. 629; *Osborne v. Brenar*, 1 Des-sau. 486; *Koen v. White*, Meigs, 358; *Craig v. Leiper*, 2 Yerg. 193; *Bracken v. Martin*, 3 Id. 55; *Childress v. Holland*, 3 Hey. 274; *McMillin v. McMillin*, 7 Monr. 560; *John-*

ston v. Mitchell, 1 A. K. Marsh. 225; *Logan v. McChord*, 2 Id. 224; *Eubank v. Hampton*, 1 Dana, 343; *Brouddus v. Ward*, 8 Mo. 217; *Scott v. Barker*, 14 Ohio, 547; *Mason v. Wallace*, 3 McLean, 148; *Tiernan v. Roland*, 3 Harris, 429; *De Cordova v. Smith*, 9 Texas, 129; *Smith v. Hampton*, 13 Id. 459; *Milnor v. Willard*, 34 Ill. 38; *Rose v. Swan*, 56 Ill. 37; *Bragg v. Olson*, 128 Ill. 540; *Morse v. Serbold*, 147 Ill. 318.

³ *Dragoo v. Dragoo*, 50 Mich. 573; *Chandler v. McKinney*, 6 Mich. 217; *Dow v. Jewell*, 21 N. H. 470; *Cusey v. Hall*, 81 Ill. 160.

⁴ *Bowen v. McCarthy*, 85 Mich. 26.

⁵ *Story's Eq. Jur.* § 789; *Champion v. Brown*, 6 Johns. Ch. 398; *Robinson v. Appleton*, 124 Ill. 281.

nature of a proceeding *in rem* rather than *in personam*; and no personal decree can be had against the assignee for the purchase money, unless he has assumed the payment as a part of the price he was to pay for his interest in the land.¹

On a bill by a vendor for the specific performance of a written contract for the sale and conveyance of land, when abstracts are to be furnished, showing a good and merchantable title, the burden of proof will rest on the complainant to show that he has, and can convey to the other party such a good and merchantable title.²

As to lands out of the State.—Where the court has acquired jurisdiction of the person of the defendant, it may compel him to specifically perform his contract for the conveyance of land, although the land may be situated in another State. The decree in such case will operate upon the person of the defendant.³

SECTION II.

PARTIES TO.

In case of a contract for the sale of real estate, if the vendor should die, and a bill is brought by his personal representatives for a specific performance of the contract, all the heirs of the vendor ought to be made parties, either as complainants or as defendants, before a specific performance is decreed.⁴ In Michigan it has been held that in such a case the heir-at-law, and not the personal representative of the deceased, is the proper person to file the bill.⁵ For the same reason, if the vendee should die, on a like bill brought by the vendor or his personal representatives for a specific performance, the heirs, or devisees, if any, of the vendee, as well as his personal representatives, should be made parties to the bill.⁶

¹ *Champion v. Brown*, and *Robinson v. Appleton*, *supra*.

² *Hull v. Glover*, 126 Ill. 123.

³ *Cloud v. Greasley*, 125 Ill. 313; *Baker v. Rockabrand*, 118 Ill. 365; *Cooley v. Scarlett*, 38 Ill. 316; *Penn v. Lord Baltimore*, 1 Ves. Sr. 441; *Massie v. Watt*, 6 Cranch, 148; *Brown v. Desmond*, 100 Mass. 267; *Hicks v. Turk*, 72 Mich. 311.

⁴ Story's Eq. Pl. § 160; *Morgan v. Morgan*, 2 Wheat. 297, 298; Edwards on Parties, 129-136; Calvert on Parties, 163-170; *Roberts v. Marchant*, 1 Hare, 547.

⁵ *Hurse v. Dexter*, 9 Mich. 246.

⁶ *Townsend v. Camperdown*, 9 Price, 130; Story's Eq. Pl. §§ 160, 177.

Where a vendor has, by his bond or covenant, bound his heirs to the performance of the obligation or covenant, if he should die, and a bill should be brought for specific performance against the heirs, the executor or administrator would be a necessary party.¹

The general rule is, that the parties to the contract are the only proper parties to a suit for a specific performance; and, except in the case of an assignment of the entire contract, there must be some special circumstances to authorize a departure from the rule.²

All the heirs of an intestate, as well as the administrator, should be made parties to a bill in chancery to enforce the specific performance of a contract made by the intestate in his lifetime, to convey a tract of land.³

Where land that has been contracted to be conveyed is deeded away to a third person, both the party to the contract and the person to whom the land has been conveyed should be made parties to the case made by the bill.⁴ A wife is not a proper party where she has not released her dower.⁵

SECTION III.

FRAME OF BILL.

The bill, in cases of specific performance, should describe the land with such accuracy as to enable the court to decree a conveyance.⁶

The complainant should set out in his bill the contract according to its legal effect, and should aver a performance of all the conditions precedent on his part;⁷ but a general allegation that he has "done all that he was bound by the contract

¹ Story's Eq. Pl. § 17; *Knight v. Knight*, 3 P. Wms. 333; *Plunkett v. Penton*, 2 Atk. 51; Coop. Eq. Pl. 38, 39.

² *Willard v. Taylor*, 8 Wallace, 557; *Tasker v. Small*, 3 Mylne & Craig, 69; Story's Eq. Pl. § 177 b; *Gibbs v. Blackwell*, 37 Ill. 191; *Allen v. Woodruff*, 96 Ill. 11.

³ *Duncan v. Wickliffe*, 4 Scam. 452; *Mix v. Beach*, 46 Ill. 311.

⁴ *Daily v. Litchfield*, 10 Mich. 29; *Morris v. Hoyt*, 11 Mich. 9; *Brener v. Dodge*, 28 Mich. 359.

⁵ *Richmond v. Robinson*, 12 Mich. 193.

⁶ *Gray v. Davis*, 3 J. J. Marsh. 381.

⁷ *Bates v. Wheeler*, 1 Scam. 54; see *Morton v. Smith*, 86 Ill. 117.

to do," is held insufficient; the particular facts which he has performed should be stated, in order that the court may determine whether he has done all that he ought.¹ Where, however, the complainant has partially performed the contract on his part, a formal allegation in the bill, that he is ready to complete the performance, is unnecessary.²

The bill may be framed so as to obtain specific performance or cancellation of the contract.³

If the complainant wishes to set off against the amount to be paid by him, an indebtedness to him from the other party, he must lay the proper foundation for it in his bill, or he can not have the same allowed.⁴

The complainant need not at his peril state the precise amount due on the contract. He may state his case most favorably to himself, and if, upon the equities of the case, the court should decree a different amount, he can then conform to its judgment.⁵

Tender.—It is not only necessary that a party asking to enforce a contract for the purchase of a tract of land, should make a tender of the purchase money, but he must bring the money into court, and deposit it with the clerk.⁶

The failure of the vendee to tender performance and demand a deed before filing a bill for the specific performance of a contract for the sale and conveyance of land, only affects the question of costs.⁷

When there are conflicting interests set up by a vendee in a land contract and his wife, and one to whom such vendee has assigned in trust for creditors, it is competent for the vendor, in his bill for specific performance, to ask to have the

¹ *Davis v. Harrison*, 4 Litt. 261.

² *Hatcher v. Hatcher*, 1 McMullen, Ch. 311; *Roby v. Cossitt*, 78 Ill. 633.

³ *Mills v. Metcalf*, 1 A. K. Marsh. 477; see, also, *Yonell v. Allen*, 18 Mich. 107; *Chiner v. Hovey*, 15 Mich. 18.

⁴ *Scott v. Shepherd*, 3 Gilm. 483.

⁵ *Hull v. Peer*, 27 Ill. 312.

⁶ *Doyle v. Teas*, 4 Scam. 202; *Wright v. McNeely*, 11 Ill. 241; *DeWolfe v. Long*, 2 Gilm. 679; see *Webster v.*

French, 11 Ill. 254; *Anderson v. White*, 27 Ill. 63; *Irwin v. Bleakley*, 67 Pa. St. R. 24; *Deichman v. Deichman*, 49 Mo. 187.

⁷ *Morris v. Hoyt*, 11 Mich. 8; *Daily v. Ritchfield*, 10 Mich. 29; see upon tender, *Allen v. Atkinson*, 21 Mich. 499; *Ingersoll v. Horton*, 7 Mich. 405; *Smith v. Lawrence*, 15 Mich. 499; *Hunt v. Thorn*, 2 Mich. 213; *Ritson v. Dodge*, 33 Mich. 443.

rights of these conflicting claimants determined. In such a case the bill resembles a bill of interpleader.¹

No. 139. Bill for specific performance of a written agreement—by a vendee v. vendor.

STATE OF MICHIGAN.

The Circuit Court for the County of ———. In Chancery.

To the Circuit Court for the County of ———. In Chancery.

1. Your orator, A B, of, etc., respectfully represents unto the court, that on, etc., one C D, being, or pretending to be seized and possessed in fee simple of the following described real property, situate, lying and being in the county of ———, in the State of ———, to wit: (*Here describe the premises*), and being so seized, on that day, entered into a written agreement with your orator, for the sale of the same, which said agreement was signed by the said C D and your orator, and by which the said C D covenanted and agreed for himself, his heirs, executors and administrators, for and in consideration of the sum of ——— dollars, to be paid as hereinafter mentioned, well and truly to convey by a good and sufficient warranty deed, in fee simple, to your orator, his heirs or assigns, the tract or parcel of land above described; and, in consideration whereof, your orator covenanted and agreed to pay the said C D, his heirs, executors or administrators, the said sum of ——— dollars, in manner following, to wit: (*Here state the manner of payments, as in agreement*), as by the said agreement, ready to be produced in court, and a copy of which, hereto attached and filed, marked "Exhibit A," and made a part of this bill, will more fully appear.

2. Your orator further represents, that he has always been willing and ready to comply with the terms of said agreement on his part to be performed; that on, etc., he applied to the said C D, and offered to pay him the sum of ——— dollars, being the balance then due the said C D, under the said agreement, on his delivering to your orator a sufficient warranty deed for the said premises, according to the said agreement; yet the said C D refused, and still refuses, to comply with the agreement on his part; although your orator is, and always has been, ready to pay the said sum of ——— dollars, and to fully perform his part of the said agreement, whenever the said C D will make and deliver to him a good and sufficient deed for the premises aforesaid.

Forasmuch, therefore, as your orator is without remedy in the premises, except in a court of equity, your orator prays:

I. The said C D, who is made a party defendant to this bill, may be made to make full and direct answer to the same, *but not under oath, the answer under oath being hereby waived*;

II. That the said defendant may be decreed specifically to perform the said agreement entered into with your orator as aforesaid, and to make a good and sufficient deed of conveyance to your orator for the said described premises, your orator being ready and willing, and hereby offering specifically to perform the said agreement on his part, and upon the defendant's making out a good and sufficient title to the said premises, and executing a

¹ *Hanchett v. McQueen*, 2 Mich. 22.

proper conveyance thereof to your orator, pursuant to the terms of the said agreement, to pay to the defendant the residue of the said purchase money;

III. And that your orator may have such other and further relief as equity may require, and to this court shall seem meet.

(Add prayer for process as in No. 114 and affidavit.)

No. 140. *Bill for specific performance of a written agreement—by a vendor v. vendee.*

STATE OF MICHIGAN.

The Circuit Court for the County of ——. In Chancery.

To the Circuit Court for the County of ——. In Chancery.

1. Your orator, A B, of, etc., respectfully represents unto this court, that your orator being seized in fee simple of the following described real property, with its appurtenances, situated in the county of —, in the State of —, to wit: (*Here describe the premises*), and being desirous of selling such premises, and one C D being minded to purchase the same, your orator and the said C D, on, etc., entered into and signed a memorandum of agreement, in writing, respecting the said sale and purchase, in the words, or to the purport and effect following, to wit: (*Here state the agreement verbatim*), as by the said memorandum of agreement, ready to be produced in court, will fully appear.

2. And your orator further represents that the said C D paid to your orator the sum of — dollars, part of the said purchase money, at the time of signing the said agreement; and your orator delivered an abstract of his title to the said premises to the said C D; and your orator has always been ready and willing to perform his part of the said agreement, and, on being paid the remainder of his said purchase money, with interest, to convey the said premises to the said C D and his heirs, and to let him into possession and the receipt of the rents and profits thereof from the time in the said agreement in that behalf mentioned; and your orator hoped that the said C D would have performed the said agreement on his part, as in justice and equity he ought to have done.

3. But now, so it is, may it please the court, that the said C D alleges that he is and always has been ready and willing to perform the said agreement on his part in case your orator could have made, or can make, him a good and sufficient title to the said premises, but that your orator is not able to make a good title thereto; whereas, on the contrary, your orator charges and insists that he can make a good and sufficient title to the said premises.

Forasmuch, therefore, as your orator is without remedy in the premises, except in a court of equity, your orator prays:

I. That the said C D, who is made a party defendant to this bill, may be made to make full and direct answer to the same, *but not under oath, the answer under oath being hereby waived;*

II. That the said C D, defendant, may be compelled by the decree of this honorable court specifically to perform the said agreement with your orator, and to pay to your orator the remainder of the said purchase money, with interest on the same from the time the said purchase money ought to have been paid, your orator being willing, and hereby offering specifically

to perform the said agreement on his part, and on being paid the said remaining purchase money and interest, to execute a proper conveyance of the said described premises to the said C D, and to let him into possession of the rents and profits thereof, according to the tenor and effect of the said agreement;

III. And that your orator may have such other and further relief as equity may require and to this honorable court shall seem meet.

(Add prayer for process as in No. 114, and affidavit.)

No. 141. Bill for specific performance on a bond for a deed—vendee v. the legal representatives of vendor.

STATE OF MICHIGAN.

The Circuit Court for the County of ——. In Chancery.
To the Circuit Court for the County of ——. In Chancery.

1. Your orator, A B, of, etc., respectfully represents unto the court that on, etc., one C D, late of, etc., being the owner in fee simple of the following described real property, situate, lying and being in the county of, etc., known and designated as follows, to wit: *(Here insert description.)* And being desirous to sell the said premises, and your orator being mindful to purchase the same, the said C D, on the day aforesaid, entered into a certain writing obligatory or bond for a deed with your orator, for the sale thereof to him, which said writing obligatory or bond, bearing date on the day and year above mentioned, and signed and sealed by the said C D, is in the words and figures following, to wit: *(here set out the bond verbatim,)* as by the said writing obligatory or bond for a deed, ready to be produced in court, will more fully appear.

2. Your orator further represents, that on, etc., he paid the said C D the sum of — dollars, being a part of the purchase money due by the terms of the said writing obligatory, which said sum was received by the said C D, and indorsed by him upon the said writing obligatory.

3. Your orator further represents, that on or about the — day of —, 18—, the said C D departed this life intestate, leaving D D, his widow, and E D and F D, his children, and only heirs-at-law; and that afterward, on, etc., one E F, of, etc., was duly appointed by the — court of said county of —, administrator of the estate of the said C D, and then and there took upon himself the burden of such administration.

4. Your orator further represents that afterward, on, etc., he paid to the said E F, administrator, as aforesaid, the sum of — dollars, being the balance due to said estate of the said C D, according to the terms and conditions of said writing obligatory.

5. Your orator further represents, that the said C D, in his lifetime, and the said E F, administrator, as aforesaid, since the death of the said C D, have wholly failed to execute and deliver to your orator a good and sufficient deed of conveyance for the said premises; the said E F insisting that he, as such administrator, has no power or authority to do so.

6. And your orator further shows that the said E D and F D are minors, under the age of — years, and have no legal guardian.

Forasmuch, therefore, as your orator is without remedy in the premises, except in a court of equity, your orator prays :

I. That the said D D, E D, F D, and E F, administrator of the estate of C D, deceased, who are made parties defendant to this bill, may be required to make full and direct answer to the same, *but not under oath, the answer under oath being hereby waived;*

II. That a guardian *ad litem* may be appointed for the infant defendants named above;

III. That a good and perfect deed of conveyance may be made to your orator for the premises aforesaid;

IV. That a commissioner may be appointed by the court to make and execute such deed, or that the master in chancery of this court be directed to execute the same;

V. And that your orator may have such other and further relief as equity may require and to this honorable court shall seem meet.

(Add prayer for process as in No. 114, and affidavit.)

No. 142. Bill for specific performance by lessee against lessor of a written agreement for a lease of a house.

STATE OF MICHIGAN:

The Circuit Court for the County of ——. In Chancery.

To the Circuit Court for the County of ——. In Chancery.

1. Your orator, A B, of, etc., respectfully represents unto the court, that C D, of, etc., the defendant hereinafter named, being possessed of the premises described as follows, to wit: *(Here insert description.)* And being desirous to let the same, on, etc., proposed and agreed to lease to your orator the same, with the appurtenances, and thereupon your orator and the defendant executed a certain memorandum or agreement of that date, in the words and figures following, that is to say: *(Here set out copy of agreement verbatim)*, as by the said agreement, ready to be produced in court, will appear.

2. Your orator further represents, that in expectation and confidence that a lease would have been executed to him of the premises, pursuant to the terms of the said agreement, your orator has expended sundry sums of money in the said premises; and has always been ready to perform his part of the said agreement, and to accept a lease of the said premises, pursuant to the terms thereof. And for that purpose caused a draft of a lease to be drawn pursuant to the terms of the said agreement, and tendered the same to the defendant for his perusal and approbation, but he refused to accept or peruse the same. And your orator has frequently applied to the defendant and requested him to execute to your orator a lease of said premises conformable to the said agreement. And your orator well hoped that no dispute would have arisen, touching the said agreement and the leasing of said premises, but that the defendant would have complied with the reasonable request of your orator, as in equity he ought to have done. But now so it is, the defendant pretends that no such agreement was ever entered into between your orator and the defendant, or any agreement, or that he consented to grant a lease to your orator, whereas your orator charges the contrary of such pretenses to be the truth. Nevertheless, the defendant refuses to comply with your orator's said reasonable requests, or to perform the aforesaid agreement.

Forasmuch, therefore, as your orator is without an adequate remedy in the premises, except in a court of equity, your orator prays :

I. That the said C D, who is made party defendant to this bill, may be required to make full and direct answer to the same, *but not under oath, the answer under oath being hereby waived.*

II. That the court may decree that the said agreement may be specifically performed and carried into execution.

III. That the defendant may be decreed to execute a lease of the said premises to your orator according to the terms of said agreement, your orator hereby offering to execute a counterpart thereof, and in all other respects to perform his part of the said agreement.

IV. And that your orator may have such other and further relief in the premises as equity may require and to this court shall seem meet.

(Add prayer for process and affidavit.)

SECTION IV.

DECREE.

Declaration of right to specific performance.—According to the old practice, there were two ways of framing a decree in a suit for specific performance. The one was to declare that the complainant was entitled to a specific performance if a good title could be shown, and then to direct a reference as to the title; the other, to refer the title to the master, and to follow up that direction by a declaration, that if a good title was shown, the agreement ought to be specifically performed.¹ And the omission of this declaration is often attended with inconvenience.²

Where the question of title is not the only issue, but the defendant resists specific performance on any other ground, it was specially necessary that a declaration that if a good title was shown, the agreement ought to be performed, should be inserted.³ Of late, however, it is seldom inserted.⁴ Nevertheless, where a reference of the title is directed, it will, it seems, be implied.⁵

Where a reference of title is directed, the declaration as to

¹ Seaton on Decrees, 223; *Stevens v. Guppy*, 3 Russ. 182.

² *Id. Ib.*; *Mole v. Smith*, Jac. 495.

³ Seaton on Decrees, 210; *Pitt v. Davis*, 3 Russ. 182, note.

⁴ *Harding v. Beckford*, cited in Seaton on Decrees, 210; *Burroughs*

v. Oakley, 3 Swanst. 172; *Le Grand v. Whitehead*, 3 Russ. 309, note; but see *Burton v. Todd*, 1 Swanst. 258.

⁵ Seaton on Decrees, 210; see *Mole v. Smith*, Jac. 494; *Le Grand v. Whitehead*, 1 Russ. 309.

the right to specific performance is usually made on further directions.¹

Where specific performance is decreed without a reference of title, it will be made upon the original hearing.²

Reference of title.—Generally, either the vendor or the purchaser may insist upon a reference of the title in the first instance; the vendor being entitled to the opportunity of perfecting it, and the purchaser of fully investigating it, before the master. But either party may preclude himself from this right by his mode of pleading.³ So where the acts of the purchaser amounted to a waiver of his right, specific performance was decreed in the first instance;⁴ but taking possession and acts of ownership were held not to be a waiver under the circumstances.⁵

The direction is to inquire whether the vendor can make title, not whether he could do so at the time of entering into the contract.⁶ If a title can be made before the hearing,⁷ or before the report,⁸ or upon the hearing for further directions,⁹ it is sufficient.

Formerly the court directed a reference of the title only in the first instance, and, upon further directions, directed a reference back to inquire at what time a good title could be made, with a view to costs.¹⁰ But now the reference will be extended to both objects in the first instance.¹¹ If a reference for the latter purpose is not obtained in the first instance, the defendant is not precluded from obtaining it after the report.¹²

¹ *Seaton on Decrees*, 210; *Bridges v. Robinson*, 3 Mer. 694.

² *Margravine v. Noel*, 1 Mad. 317; *Dakin v. Cope*, 2 Russ. 175.

³ *Jenkins v. Hiles*, 6 Ves. 653, 654; *Seaton on Decrees*, 210.

⁴ *Fleetwood v. Green*, 15 Ves. 591; *Margravine v. Noel*, 1 Mad. 310; see *Fludyer v. Cocker*, 12 Ves. 25; *Balfour v. Welland*, 16 Ves. 151.

⁵ *Burroughs v. Oakley*, 3 Swanst. 159.

⁶ *Langford v. Pitt*, 2 P. Wms. 630.

⁷ *Wynn v. Morgan*, 7 Ves. 202.

⁸ *Langford v. Pitt*, 2 P. Wms. 630; *Jenkins v. Hiles*, 6 Ves. 655;

Seton v. Slade, 7 Ves. 279; *Mortlock v. Buller*, 10 Ves. 315; *Hepburn v. Dunlap*, 1 Wheat. 179; see *Coffin v. Cooper*, 14 Ves. 205.

⁹ *Paton v. Rogers*, 6 Mad. 256.

¹⁰ *Gibson v. Clarke*, 2 V. & B. 103.

¹¹ *Seaton on Decrees*, 211; *Wright v. Bond*, 11 Ves. 39; *Jennings v. Hopton*, 1 Mad. 211; *Anon.*, 3 Mad. 495.

¹² *Id.*; *Gibson v. Clarke*, 2 V. & B. 103; *Daly v. Osborne*, 1 Mer. 382; *Birch v. Haynes*, 2 Mer. 444; see *Jennings v. Hopton*, 1 Mad. 211; *Hyde v. Wroughton*, 3 Mad. 279; *Lubin v. Lightbody*, 8 Price, 606; *Anon.*, 3 Mad. 495.

Payment of purchase money and execution of conveyance.—The payment of the purchase money and the execution of the conveyance are simultaneous acts, and should be done interchangeably.¹

Dower rights.—Where specific performance is decreed of a contract for the sale and conveyance of land subject to the dower rights of the wife of the vendor, who was not a party to the contract, the decree may also provide for compensation to the complainant for the present value of such contingent dower.²

Delivery of deeds, etc.—There should be a direction for the delivery up of deeds, writings, etc., pertaining to the title of the estate.³

When one is still owing on a contract, and performance is decreed in his favor, he should be ordered to bring the balance into court for the party entitled.⁴ Equity will not compel the performance by a husband of a contract to procure his wife's signature to a deed of real estate, or to transfer her homestead interest.⁵

No. 143. Decretal order for a reference as to the title of a vendor, etc.

(Caption and title of cause as in No. 97, ante, page 179.)

This cause coming on to be heard upon the pleadings filed and proofs taken therein, and the said pleadings and proofs having been read, and the counsel for the respective parties having been heard, and in consideration of the premises it is ordered, that this cause be referred to a commissioner of this court to inquire whether a good title can be made to the premises comprised in the agreement between the parties to this cause, mentioned in the pleadings therein; and that he state his opinion thereon to the court. And in case he shall be of opinion that a good title can be made, it is ordered that he do inquire and state when it was first shown that a good title could be made. And that the said commissioner do inquire and report as to the quantity of land agreed to be conveyed by the complainant; and

¹ *Margravine of Auspach v. Noel*, 1 Mad. 316; *Urmston v. Singleton*, cited in *Seaton on Decrees*, 214; *Corbus v. Teed*, 69 Ill. 205.

² *Walker v. Kelly*, 91 Mich. 212.

³ *McNamara v. Williams*, 6 Ves. 144; *Nicholas v. Marsh*, 62 Mich. 439.

⁴ *Raymond v. Shawboose*, 34 Mich. 142.

⁵ *Phillips v. Stanch*, 20 Mich. 369; *Weed v. Terry*, Walk. Ch. 501; same, 2 Doug. 344; *Ring v. Burt*, 17 Mich. 465; *Buchoz v. Walker*, 19 Mich. 224; *Richmond v. Robinson*, 12 Mich. 195; *Daily v. Litchfield*, 10 Mich. 29; see *Stevenson v. Jackson*, 40 Mich. 702.

that he take an account of the payments made upon such agreement by the defendant; and that he ascertain and report the balance now due from him upon the said agreement.

And for the better discovery of the matters aforesaid the parties are to produce before the said commissioner upon oath, all deeds, books, papers and writings in their custody or power relating thereto; and are to be examined upon interrogatories as the said commissioner shall direct; and to take such further proof as either party may produce before him in relation to the several matters mentioned, and report the same to the court. And this court reserves the consideration of all further directions and of the costs of this suit, until after the said commissioner shall have made his report. And either of said parties are to be at liberty to apply to the court as occasion may require.

No. 144. Interlocutory decree for an account.

(Caption, and title of cause as in No. 97, ante.)

This cause coming on to be heard upon the pleadings filed and the proofs taken therein, and the said pleadings and proofs having been read, and the counsel for the respective parties having been heard, and the court being fully advised in the premises, and on consideration thereof, doth order, adjudge and decree that this cause be referred to a commissioner of this court to take a mutual account of all dealings and transactions between the complainant and defendant in this cause, for the better clearing of which account the parties are directed to produce before the said commissioner, upon oath, all deeds, books, papers and writings in their custody or power, relating thereto, and are to be examined upon interrogatories, as the said commissioner shall direct; who, in taking the said account, is to make unto the parties all just allowances; and what, upon the balance of the said account, shall appear to be due from either party to the other, is to be paid as the said commissioner shall direct. And this court reserves the consideration of the costs of this suit, and of all other directions, until after the said commissioner shall have made his report; when either party is to be at liberty to apply to the court, as occasion shall require.

No. 145. Final decree for a specific performance of an agreement.

(Caption, and title of cause as in No. 97, ante.)

This cause coming on to be heard for further directions on the report of the commissioner, to whom the same stood referred, and the said report, together with the pleadings and proofs, having been read, and the counsel for the parties respectively having been heard, and the court being fully advised in the premises, and it appearing to the court that a good title can be made by the complainant to the premises comprised in the agreement between the parties to this cause mentioned in the pleadings therein, and dated the — day of — 18—; it is therefore ordered, adjudged and decreed, and this court does order, adjudge and decree, that the said agreement so made and entered into between the complainant and defendant, and duly proved in this cause, be specially performed. And it is further ordered, adjudged and decreed, that the complainant execute

and deliver to the defendant a proper and sufficient conveyance in fee of the premises described in the same agreement between the parties, and particularly described therein as follows, to wit: (*Here insert description by metes and bounds.*) to be approved by the commissioner of this court, in case the parties differ about the same. And it is further ordered, adjudged and decreed that the defendant, upon the tender or delivery to him of such conveyance, do pay unto the complainant the sum of — dollars, the balance of the purchase money of said premises, reported by the said commissioner to be still due, with interest thereon at the rate of — per cent. from the date of the said commissioner's report. And it is further ordered, adjudged and decreed that the defendant pay to the complainant the costs of this suit, to be taxed. And it is further ordered, adjudged and decreed, that the complainant have execution against the defendant for the said sum of — dollars, the balance of said purchase money reported by the commissioner to be due, with interest from the date of his report, and for the costs, to be taxed as aforesaid, according to the course and practice of the courts. And either of the parties is to be at liberty to apply to this court as occasion may require.

Decree, how enforced.—A suit for specific performance like that of foreclosure is of two-fold character, partly *in rem* and partly *in personam*. The court may enforce the contract either by operating upon the person to compel a conveyance, or may pass the title of the land by decree.¹

A decree in favor of the vendor of land on a bill by him for a specific performance of the contract of purchase, finding the sum due the vendor, and ordering the sale of the bargained premises, and awarding the vendor an execution for any unsatisfied balance of the purchase money that may remain after the sale, has been held to be proper.²

But a decree directing one party to pay on a certain day, on condition of the other surrendering the land, without ordering a surrender, or reserving to the court to determine on the performance, was held to be erroneous.³ So, it is erroneous in a decree for specific execution to appoint a commissioner to convey when the purchase money is paid; as the time when the conveyance should be made is proper for the decision of the court alone.⁴

¹ *Burrell v. Eames*, 5 Wis. 260.

² *Corbus v. Teed*, 69 Ill. 205; *Lovridge v. Shurtz*, 111 Mich. 618.

³ *Jarman v. Davis*, 4 T. B. Monr. (Ky.) 115.

⁴ *Payne v. Wallace*, 6 T. B. Monr. (Ky.) 380; see *McDaniel v. Watson*, 4 Bush (Ky.), 334; *Roberts v. Lovejoy*, 28 Texas, 641; *Etchison v. Dorsey*, 1 Bland (Md.), 535.

CHAPTER XXVII.

BILLS RELATING TO PARTNERSHIP MATTERS.

- Section 1. WHERE A DISSOLUTION WILL BE DECREED.
2. ACCOUNT BETWEEN PARTNERS.
3. APPOINTMENT OF A RECEIVER.
4. FORMS OF BILLS.
5. FORMS OF DECREES AND ORDERS.

SECTION I.

WHERE A DISSOLUTION WILL BE DECREED.

Where a partnership is formed for a definite term, neither partner can file a bill for dissolution of the partnership, or for the appointment of a receiver, before the expiration of the time limited, merely on the ground that he is dissatisfied, or that the partners quarrel.¹

In matters of difficulty or controversy between partners, a resort to a court of equity is most usual and most convenient for the adjudication and settlement of the same.² And where a party is a member of two different firms, chancery will adjust matters of difference which would otherwise be settled at law.³

The courts of common law have no power whatever of decreeing or causing a dissolution of a partnership.⁴ In some cases in which courts of equity would make such a decree, as where a partnership was formed through fraud, courts of law might apply the principle that the contract so vitiated never had force, and on this ground declare it null, and avoid the

¹ *Henn v. Walsh*, 2 Edw. Ch. 129; Part. § 284; 1 Story's Eq. Jur. § 673; *Loomis v. McKenzie*, 31 Iowa, 425. *Stone v. Fouse*, 3 Cal. 294; *Nugent v.*

² *Bracken v. Kennedy*, 3 Scam. Locke, 4 Call. 320; *Wilson v. Lussen*, 559; *Strong v. Clawson*, 5 Gilm. 346. 5 Cal. 116; *Barnstead v. Mining Co.*,

³ *Haven v. Wakefield*, 39 Ill. 509. 5 Cal. 299.

⁴ *Parsons on Part.* 457; *Story on*

partnership. But courts of equity have full power over this matter; and upon a bill filed by any partner, alleging a sufficient cause, and upon proper evidence, if the facts are not admitted, the court will decree a dissolution of the partnership.¹

Where the duration of a partnership is fixed, it requires something more than the mere will of the party to dissolve it within the term; but only a little more is needed, and a dissolution will be granted where dissension prevents all hope of advantage.²

Where one partner got possession of the entire proceeds of the year's operation, without the consent of his copartner (there being nothing in the copartnership agreement authorizing him to do so), and assumed the exclusive control of the whole business, it was held to be such a breach of faith as to authorize a decree for a dissolution of the partnership.³

The denial by one partner of all rights of his copartner in the partnership property, and his claim of the right of exclusive possession and use, entitle his copartner to a dissolution and to an accounting.⁴

Where one partner holds exclusive possession of the partnership property, and wrongfully refuses to let in the other partner, he will be accountable in a court of equity to such partner for his share of the profits made, which accounting will cover the time during which the partnership assets are used in making them.⁵

A decree for a dissolution will be warranted, if it is impossible that the partnership should be beneficially continued; namely, if the principles on which the scheme is based are found, on examination, to be erroneous and impracticable; ° or

¹ *Parsons on Part.* 457; *Baxter v. West*, 1 Drewry & Sm. 173; *Dumont v. Ruepprecht*, 38 Ala. 175; *Meaher v. Cox*, 37 Ala. 20; *Harper v. Lamping*, 33 Cal. 641; *Hamilton v. Stokes*, 4 Price, 161; *Oldaker v. Lavender*, 6 Sim. 239; *Green v. Barrett*, 1 Sim. 45; *Jones v. Yates*, 9 B. & C. 532; *Colt v. Wollaston*, 2 P. Wms. 154; *Fogg v. Johnston*, 27 Ala. 432.

² *Bishop v. Breckless*, 1 Hoff. Ch. R. 534; *Meaher v. Cox*, 37 Ala. 201.

³ *Kennedy v. Kennedy*, 3 Dana, 239; *Gowan v. Jeffries*, 2 Ashm. 296; *Maude v. Rodes*, 4 Dana, 144; *Story v. Moon*, 8 Dana, 331; *Garretson v. Weaver*, 3 Edw. Ch. 385.

⁴ *Groth v. Payment*, 79 Mich. 290.

⁵ *Major v. Todd*, 84 Mich. 85.

⁶ *Beaumont v. Meredith*, 3 Ves. & B. 180; *Clough v. Rudcliffe*, 1 DeGex & S. 164.

where the partnership is formed to effect a particular object, which is found to be impracticable and wholly fails;¹ or where the circumstances have so changed as to render it impossible to carry on the partnership without injury to all the partners;² or where the object of a partnership is destroyed, as a steam-boat.³

Bad temper, overbearing and oppressive conduct, quarreling, indolence and inattention, intemperance or bad habits and disgraceful conduct, wild speculations, gross extravagance, absenting himself from his business, or entering into other business engagements inconsistent with his duty to his partners, or any conduct which brings disgrace upon the firm or impairs their credit,⁴ are all causes which may be sufficient, if their degree be sufficient, and otherwise not.⁵

SECTION II.

ACCOUNT BETWEEN PARTNERS.

Whenever there is a dissolution of a partnership, for any cause, it would seem that there must be an account if it is demanded by any person in interest.⁶

The taking of an account is a frequent preliminary to any further action by a court of equity; because by this means alone can the court ascertain the true relation of the parties as to their rights and obligations.⁷

¹ *Nockells v. Crosby*, 3 B. & C. 814; 5 Dowl. & R. 751.

² *Harrison v. Tennant*, 21 Beav. 482.

³ *Claiborne v. Creditors*, 18 La. An. 501.

⁴ *Norway v. Rowe*, 19 Ves. 148; *Waters v. Taylor*, 2 Ves. & B. 304; *Howell v. Harvey*, 5 Ark. 278; *Master v. Kirton*, 3 Ves. 74; *Wilson v. Greenwood*, 1 Swanst. 481; *Blakeney v. Dufour*, 15 Beav. 40; *Hall v. Hall*, 12 Id. 414, and note to 419; *Williamson v. Wilson*, 1 Bland, 418; *Fogg & Vanderslize v. Johnston*, 27 Ala. 432; *Durbin v. Barber*, 14 Ohio, 311.

⁵ *Parsons on Part.* 459.

⁶ *Parsons on Part.* 511; *Adams Eq.* 239, *et seq.*; *Collyer on Part.* § 298; 1 *Story's Eq. Jur.* § 671; *Forman v. Hanfray*, 2 Ves. & B. 329; *Harrison v. Armitage*, 4 Mad. 143; *Russell v. Loscombe*, 4 Sim. 8; *Knowles v. Haughton*, 11 Ves. 168; *Waters v. Taylor*, 15 Ves. 15; *Ex parte Broadbent*, 1 Mont. & A. 635; see *Hayes v. Reese*, 34 Barb. R. 151; *Vermillian v. Bailey*, 27 Ill. 230; *Pope v. Salsman*, 35 Mo. 362.

⁷ *Baird v. Baird*, 1 Dev. & Bat. 524; *McRae v. McKinzie*, 2 Dev. & Bat. 232; *Camblat v. Tapery*, 2 La. An. 10; *Kennedy v. Kennedy*, 3 Dana, 240.

A copartnership being established, and it being shown that profits have accrued, and are in the hands of either partner, for which he refuses to account to his copartner, a court of equity will compel an accounting.¹

An account and a dissolution seem to be so clearly connected that an account is seldom granted unless a dissolution is also asked for;² but this can not be deemed a rule of equity,³ although in the great majority of cases, where the relations between the partners are such that one of them can obtain an account only through the interposition of a court, a dissolution is and should be asked for.⁴

On the filing of a bill in chancery for the settlement of partnership accounts, the parties can not introduce their individual accounts into the statement.⁵

Equity will recognize and protect debts due from the firm to an individual member, or from a member to the firm.

The proper remedy for the assignee of the rights of a partner is a bill for the settlement of the partnership accounts, to which all partners must be made defendants.⁶

Where the affairs of a partnership have not been settled and a balance struck between the members, no action at law can be maintained by one member of the firm against another. The remedy in such case is in equity to obtain a settlement of the accounts of the firm.⁷ The bill may be filed immediately upon the dissolution of the firm and without any previous adjustment of the account.⁸ It is a good defense to a claim filed against an estate of a deceased person, that its items grow out of a partnership between the claimant and the intestate, which is still unsettled.⁹

¹ *Gates v. Fraser*, 6 Bradw. 229.

² *Forman v. Hanfray*, 2 Ves. & B. 329; see *Loscombe v. Russell*, 4 Sim. 8; *Knowles v. Haughton*, 11 Ves. 168; *Waters v. Taylor*, 15 Ves. 15; *Walworth v. Holt*, 4 Mylne & Craig, 619, 635.

³ *Richardson v. Hastings*, 7 Beav. 301; *Fairthorne v. Weston*, 3 Hare, 387; *Miles v. Thomas*, 9 Sim. 609; *Goodman v. Whitcomb*, 1 Jack. & W. 593.

⁴ *Loscombe v. Russell*, 4 Sim. 8; *Waters v. Taylor*, 15 Ves. 10; *For-*

man v. Hanfray, 2 Ves. & B. 329; *Chapman v. Beach*, 2 Jac. & W. 594; *Pigott v. Bagley*, McClel. & Y. 569; *Krebell v. White*, 2 Younge & C. 15; *Parsons on Part.* 511, 512.

⁵ *Hanks v. Baber*, 53 Ill. 292; see *Bracken v. Kennedy*, 3 Scam. 559.

⁶ *Bank v. Carrollton Railroad*, 11 Wallace, 624.

⁷ *Bowzer v. Stoughton*, 119 Ill. 47.

⁸ *Horn v. Ingraham*, 125 Ill. 198.

⁹ *Bowzer v. Stoughton*, 119 Ill. 47; see *Bigelow v. Reynolds*, 68 Mich. 344.

Under an ordinary bill for a partnership accounting, and to place the firm assets in the hands of a receiver, on reference to the master to state the accounts, he can not charge a portion of the firm for losses to the firm by the wrongful acts or mismanagement of its affairs by the partner having control thereof.¹

Limitations.—A bill in equity for a partnership accounting is within the bar of the statute of limitations; and the statute commences to run from the date of the dissolution.²

After one who claims to be a partner and that he has been excluded from participation in the business, waits for six years, it is too late for him to pray for an account.³

SECTION III.

APPOINTMENT OF A RECEIVER.

Where either partner has a right to dissolve the partnership, and the co-partnership articles do not provide for the settlement of the concern, it is, of course, for a receiver to be appointed by the court, upon a bill for that purpose;⁴ and the receiver will be directed to carry on the business, until a sale of the partnership property can be effected.⁵

Where a bill is filed seeking a dissolution of a partnership, and it satisfactorily appears that the complainant will be entitled to a decree for the dissolution, a receiver will be appointed as a matter of course, the obvious reason being that the same causes which would justify a decree for dissolution would also justify the appointment of a receiver.⁶

¹ *Fordyce v. Shiver*, 115 Ill. 530; *Dole v. McGraw*, 71 Mich. 106.

² *Bonney v. Stoughton*, 122 Ill. 536; *Quayle v. Guild*, 91 Ill. 378; *Pierce v. McClellan*, 93 Ill. 246; *Wright v. LeClaire*, 3 Iowa. 221; *Story's Eq. Pr.* § 529; *Collyer on Part.* § 374; *Richardson v. Gregory*, 126 Ill. 166; *Winslow v. Leland*, 128 Ill. 304; *Horn v. Ingraham*, 125 Ill. 198.

³ *Jenny v. Perkins*, 17 Mich. 28.

⁴ *Law v. Ford*, 2 Paige Ch. R. 310; *Garretson v. Weaver*, 3 Edw.

Ch. 385; *Sloan v. Moore*, 37 Pa. St. R. 217.

⁵ *Marten v. Van Schaick*, 4 Paige Ch. R. 779; *High on Receivers*, § 481; *Kellogg v. Moore*, 97 Ill. 283; *Curyea v. Beveridge*, 94 Ill. 424.

⁶ *Birdsall v. Colie*, 9 Stockt. Ch. R. 65; *Seighortner v. Weissenborn*, 5 C. E. Green, 177; *Dunn v. McNaught*, 38 Geo. 179; *Kirby v. Ingersoll*, Harring. Ch. R. 18; *Marten v. Van Schaick*, 4 Paige Ch. 479.

When appointed.—Where it appeared that a copartnership was insolvent, and that the complainants, who were members, were excluded from their full share in the management of the concern, and that the defendant, who was the acting partner, neglected to keep proper books of account, and to keep them open for the inspection of the complainants, who were refused access to them, the court, on motion, appointed a receiver before answer and final decree.¹

As a general rule, a receiver will not be appointed without notice to those interested; but where irreparable injury would arise from delay, a receiver will be appointed without notice, leaving the other party the right to apply to have the order superseded on cause shown.²

Where there is a dispute, both as to the fact of partnership interest, and the extent of partnership property, a receiver can not be appointed to take property from the one in possession in advance of a decision on the merits.³

When a receiver is appointed in a partnership case it should be of the general assets, and not of specific personal property. Neither is it proper to order a receiver to assume possession of so much of a lot of furniture as belongs to a firm without determining what that portion is.

For rules governing the appointment of a receiver in a suit between partners, see Kerr on Receivers, 81-102; High on Receivers, §§ 472-552.

SECTION IV.

FORMS OF BILLS.

No. 146. Bill for dissolution of a partnership, and for an injunction.

STATE OF MICHIGAN.

The Circuit Court for the County of ——. In Chancery.

To the Circuit Court for the County of ——. In Chancery.

1. Your orator, A B, of, etc., respectfully represents unto the court that on, etc., your orator entered into an agreement with one C D and E F, of the same place, the defendants hereinafter named, to form a copartnership with them in the business of *auctioneers*, which agreement was reduced to writing and signed by your orator and the defendants, and was in the words and figures or to the purport and effect following, that is to say:

¹ *Gowan v. Jeffries*, 2 Ashm. 296; *Williamson v. Wilson*, 1 Bland. 418; High on Receivers, §§ 522-529.

² *Morey v. Grant*, 48 Mich. 323.

³ *Gowan v. Jeffries*, 2 Ashm. 296;

(*Here set out the agreement verbatim,*) as by the said agreement, ready to be produced in court, will appear.

2. And your orator further represents, that the said copartnership business was entered upon and has ever since continued to be carried on by your orator and the defendants in pursuance of and under the said agreement, no other articles or instrument having ever been prepared and executed between them.

3. Your orator further represents, that having much reason to be dissatisfied with the conduct of the said C D, and being desirous, therefore, to dissolve the said partnership, your orator on or about — caused a notice in writing signed by your orator to be delivered to the said C D and E F in the words and figures or the purport and effect following, that is to say: (*Here set out the notice, if one was given,*) as in and by such written notice, now in the custody or power of the defendants or one of them, when produced, will appear.

4. Your orator further represents, that the said C D has from time to time since the commencement of the said partnership, applied to his own use from the receipts and profits of the said business very large sums of money greatly exceeding the proportion thereof to which he was entitled, and in order to conceal the same the said C D, who has always had the management of the said copartnership books, has never once balanced the said books.

5. And your orator further represents, that having in the beginning of the year 18—, discovered that the said C D was greatly indebted to the said copartnership, by reason of his application of the partnership moneys to his own use, your orator, in order to form some check upon the conduct of the said C D, requested that he would pay all partnership moneys which were received in to their bankers, and would draw for such sums as he had occasion for, but the said C D has wholly disregarded such request, and has continued to apply the partnership moneys received by him to his own use without paying the same in to the bankers, and has also taken to his own use money received by the clerks, and has by such means greatly increased his debt to the partnership, without affording to your orator and the said E F any adequate means of ascertaining the true state of his accounts.

6. Your orator further represents, that he has, from time to time, applied to said C D and requested him to come to a full and fair account in respect to the said copartnership transactions, with which just and reasonable request your orator well hoped that the said C D would have complied as in justice and equity he ought to have done. But now so it is, may it please your honor, the said C D absolutely refuses so to do; and he at times pretends that he has not received and applied to his own use more than is his due proportion of the partnership profits. Whereas your orator charges the contrary thereof to be the truth, and so it would appear if the said C D would set forth a good and true account of all and every his receipts and payments in respect of the said partnership transactions, and of the gains and profits which have been made in each year since the commencement of the said partnership.

7. And your orator charges that the said C D has in fact received the sum of — dollars and upwards beyond his due proportion of the partnership profits, and that he is nevertheless proceeding to collect in the partnership debts and moneys, whereby the balance due from him will be increased,

to the great loss and injury of your orator and the said E F. And your orator charges that the said C D ought, therefore, to be restrained by the order and injunction of this honorable court from collecting and receiving any of the said partnership debts and moneys.

8. And your orator further represents unto your honor, that the said E F refuses to join with your orator in this suit. (*If deemed necessary, add interrogatories; see ante, page 39.*)

I. Forasmuch, therefore, as your orator is without adequate remedy in the premises, except in a court of equity; and to the end that the said C D and E F, who are made parties defendant to this bill, may be required to make full and direct answer to the same (*if the oath is to be waived say, "But not under oath, the answer under oath being hereby waived,"*) that the said copartnership may be declared void, and that an account may be taken of all and every the said copartnership dealings and transactions from the time of the commencement thereof; and also an account of the moneys received and paid out by your orator and the defendants respectively in regard thereto.

II. And that the defendants may be decreed to pay to your orator what, if anything, shall upon the taking of the said accounts appear to be due to him, your orator being ready and willing, and hereby offering to pay to the defendants or either of them what, if anything, shall upon the taking of the said accounts, appear to be due to them or either of them from your orator.

III. And that in the meantime the said C D may be restrained by the order and injunction of this honorable court from collecting or receiving the partnership debts or other money.

IV. And that your orator may have such other and further relief in the premises as equity may require and to this honorable court shall seem meet.

V. And may it please the court to grant unto your orator the people's writ of injunction, to be directed to the said C D, restraining him, his agents and attorneys, from collecting or receiving any of the debts due and owing to the said firm, and from using and applying any of the copartnership funds to his own use until the further order of said court.

(*Add prayer for process.*)

(*If an injunction is desired, add affidavit, as follows:*)

No. 147. *Affidavit to a bill to obtain an injunction.*

STATE OF MICHIGAN, } ss.
County of ———.

On this — day of —, 18—, before me personally appeared the above named A B, and made oath that he has heard read the above bill subscribed by him, and knows the contents thereof, and that the same is true, of his own knowledge, except as to the matters which are therein stated to be on his information and belief, and that as to those matters he believes it to be true.

C A J,

Notary Public, — County, Mich.

No. 148. *Bill for an account of partnership dealings, and an injunction, etc.*

STATE OF MICHIGAN.

The Circuit Court for the County of ——. In Chancery.

To the Circuit Court for the County of ——. In Chancery.

1. Your orator, A B, of, etc., respectfully represents unto the court, that on, etc., your orator and C D, of the same place, entered into a general copartnership together for the purpose of carrying on a general *wholesale and retail dry goods* business at, etc., the same to be carried on under the firm name and style of B & D; that your orator engaged to and did bring into said business the sum of — dollars, and was to receive *two-thirds* of the profits, and, in the same proportion, to share the losses of said business; and that the said C D engaged to and did bring into the said business the sum of — dollars, and was to receive *one-third* of the profits, and was to share the losses of said business in the same proportion; that the said copartnership business was commenced on, etc., and was continued from that date until, etc., when the same was dissolved by mutual consent; that during the continuation of said copartnership business a large amount of goods were sold by the said firm to various parties on a credit, and the said business remains unsettled.

2. Your orator further represents unto the court that no settlement of said copartnership business has ever been made between your orator and the said C D; that since the expiration of the term of the said partnership, your orator has repeatedly applied to the said C D to come to a final settlement and adjustment with respect thereto. And your orator well hoped that the said C D would have complied with your orator's reasonable request in that behalf, as in equity and justice he ought to have done. But the said C D declined, and absolutely refuses so to do.

3. Your orator further represents that the said C D has taken possession of the partnership books of the said firm, and has collected a large amount of the accounts due and owing to the same, and has refused to permit your orator to see and inspect said books of account, and wholly refuses to render to your orator any account of the copartnership moneys received by him, and to apply the same to the payment of the debts of the said firm.

4. Your orator further represents that upon a just and true settlement of the accounts of the said partnership business, it would appear that there is a large balance due from the said C D to your orator, in respect of the said business.

5. Your orator further represents, that the said C D is using the funds of the said copartnership in rash speculations on his own account, and is thereby in danger of drifting into insolvency; and your orator fears, and charges that he is in danger of losing the amount so due him from the said C D in respect to the said copartnership dealings and transactions. By reason whereof the said C D ought to be enjoined and restrained by the injunction of this honorable court from further collecting the said copartnership accounts, and from using and further applying the funds of said firm to his own use; and that some suitable person ought to be appointed by this honorable court to receive and take charge of the books of account of the said firm, and to collect the accounts due the same.

Forasmuch, therefore, as your orator is without adequate remedy in the premises, except in a court of equity, your orator prays :

I. That the said C D, who is made party defendant to this bill, may be required to make full and direct answer to the same, *but not under oath, the answer under oath being hereby waived*; and fully set forth a true and just account of all his actings and doings in respect to said copartnership business since the expiration thereof;

II. That an account may be taken under the direction of this honorable court, of all and every the said copartnership dealings and transactions, and that the same may be fully adjusted, and the respective rights of your orator and the defendant ascertained;

III. That the defendant may be decreed to pay to your orator what, if anything, shall appear upon such account to be due from him; your orator being ready and willing, and hereby offers to pay to the defendant what, if anything, shall appear to be due to the defendant from your orator;

IV. That some proper person may, in the meantime, be appointed by the court as receiver, to take charge of the said partnership books of account, and collect whatever money or property may belong or be due to the said firm.

V. And that your orator may have such other and further relief in the premises as equity may require, and to the court shall seem meet.

May it please, etc. (*Add prayer for subpoena and injunction, as in the last precedent and affiaavit.*)

SECTION V.

FORMS OF DECREES AND ORDERS.

No. 149. *Order appointing a receiver in a suit between partners.*

(*Proceed as in No. 97, ante, to the asterisk (*), and continue:*) It is ordered that E F, of, etc., be, and he is hereby appointed receiver to receive the outstanding debts and effects of the late partnership of A B and C D, in the pleadings in this cause mentioned; that the said E F enter into a bond in the penal sum of — dollars, with security, to be approved by the master in chancery of this court, conditioned for the faithful performance of his duties as such receiver, and that he will be answerable for what he shall receive of such outstanding debts and effects, and will pay the same, as this court shall from time to time direct.

And it is further ordered that the complainant and defendant do deliver over to the said E F, as such receiver, all books of account, securities and evidences of indebtedness, and effects belonging to the said partnership. And in case there shall be occasion to put any of the debts in suit for the recovery thereof, the said receiver is to make use of the names of the complainant and defendant, or either of them, as it may become necessary for that purpose. It is further ordered that the said receiver, from time to time, make report to the court of his proceedings in this behalf; and that he be at liberty to apply to the court for further directions, as he may deem necessary.

No. 150. *Decree for an account of partnership dealings.*

(*Proceed substantially as in No. 97, ante, to the asterisk (*), and then proceed as follows*): It is therefore ordered, adjudged and decreed, that this cause be referred to a commissioner of this court to take an account of the partnership dealings between the complainant and defendant, and for the better discovery of the matters aforesaid, the parties hereto respectively are ordered to produce before the said commissioner, and to leave with him until otherwise directed, all books, papers and writings in their custody, or under their control, relating thereto; and are to be examined upon oath and interrogatories, as the said commissioner shall direct; and the said commissioner will cause to come before him all such witnesses, whose testimony he may deem necessary, and examine them upon oath and interrogatories touching the said accounts. And it is ordered that what shall appear to be due from either party to the other on the balance of the said account, be paid by such party from whom such balance shall be found due to the other, within — after the report of the said commissioner shall have been approved and confirmed by this court. And it is further ordered that the said commissioner make his report herein with all convenient speed; and that the said commissioner, or either of said parties, be at liberty to apply to the court for further directions, and the court reserves the consideration of costs until after the said commissioner shall have made his report.

No. 151. *Final decree for a dissolution of partnership, and for an account.*

(*Caption and title of cause as in No. 97, ante.*)

This cause having come on to be heard upon the bill of complaint herein, the answer of the defendant thereto, the replication of the complainant to such answer, and the report of the commissioner of this court, to whom this cause was heretofore referred, to take the proofs of the matters in issue in said cause, and to state an account of the partnership dealings between said parties, which said report is hereby approved and confirmed, and having been argued by counsel for the respective parties; and the court being fully advised in the premises, and on consideration thereof, doth find: that the allegations of the said bill are substantially true as therein stated; and that the equity of this cause is with the complainant; and that, etc. (*here insert any other matter found by the court*); and that upon the statement of the account between the said parties, in respect to their partnership dealings, that there is now due from the defendant to the complainant the sum of — dollars.

It is therefore ordered, adjudged and decreed by the court that the copartnership heretofore existing between the said parties be, and the same is hereby dissolved: and the defendant pay to the complainant within — days from this date, the said sum of — dollars, with lawful interest thereon from this day until paid, and also the costs of this suit to be taxed by the clerk of this court; and in default of such payment, that execution issue therefor.

CHAPTER XXVIII.

BILLS TO REDEEM.

- Section 1. NATURE OF.
2. WHO MAY REDEEM.
3. WITHIN WHAT TIME TO BE FILED.
4. PARTIES TO.
5. TERMS OF REDEMPTION.
6. FRAME OF BILL.
7. DECREE.

SECTION I.

NATURE OF.

It is a doctrine of courts of equity that a mortgage is a mere security for the debt, and only a chattel interest; and that until a decree of foreclosure, the mortgagor continues the real owner of the fee. The equity of redemption is considered to be the real and beneficial estate, tantamount to the fee at law, and it is accordingly held to be descendible by inheritance, devisable by will, and alienable by deed, precisely as if it were an absolute estate of inheritance at law.¹

It is not essential to the right of the mortgagor to redeem that he should do so within the time limited in the defeasance. There is no rule of law which requires that a redemption shall be made within the time limited by the mortgage. Until foreclosure, it is a subsisting right, unless barred by the lapse of time.²

If a subsequent purchaser takes his conveyance with notice of the prior mortgage, he, of course, holds subject to the mortgage, but he or his grantees have still the right to redeem, and can only be deprived of that right by a foreclosure of the

¹ *Bruere v. Wharton*, 7 Sim. 483; ² *Preschbaker v. Feaman*, 32 Ill. *Russell v. Topping*, 5 McLean, 194; 475; *Willetts v. Burgess*, 34 Ill. 494. *Russell v. Ely*, 2 Black, 575.

mortgage, or by its being barred in some of the modes known to the law.¹

In the absence of fraud an agreement by the holder of a certificate of purchase to extend the time of redemption will be enforced.²

A bill to redeem is the appropriate remedy where the foreclosure is by advertisement.³

Deed absolute on its face, when deemed as a mortgage.—A deed absolute on its face will be deemed as a mortgage, in equity, if intended as a security for the payment of money;⁴ and the intention of the parties may be manifested either by a written defeasance, executed simultaneously with the conveyance, or by the acts or parol declarations of the parties.⁵ But the evidence must be clear, satisfactory and convincing, and the burden of proof is upon the party setting up the claim.⁶ It may be shown from the conduct of the parties, and facts and circumstances attending the transaction, and by those transpiring afterwards.⁷ The consideration of a deed may be

¹ *Dunlap v. Wilson*, 32 Ill. 517.

² *Chytraus v. Smith*, 141 Ill. 231;
Ins. Co. v. Kirchoff, 133 Ill. 368.

³ *Dodge v. Northrop*, 85 Mich. 243;
Drayton v. Chandler, 93 Mich. 383.

⁴ *Hughes v. Edwards*, 9 Wheat. 489; *Sprigg v. Bank*, 14 Pet. 201; S. C., 1 McLean, 178, 384; *Walton v. Crowley*, 14 Wend. 63; *Morris v. Nixon*, 1 How. U. S. 118; *Jaques v. Weeks*, 7 Watts, 261; *Babcock v. Wyman*, 19 How. U. S. 289; *Cornell v. Pierson*, 4 Halst. Ch. 478; S. C., 2 Curtiss C. C. 386; *Chickering v. Hatch*, 3 Sum. 474; *Parrington v. Pierce*, 38 Maine, 447; *Bentley v. Phelps*, 2 W. & M. C. C. R. 426; *Eldridge v. Jenkins*, 3 Story, 181; *Jewett v. Cunard*, 3 W. & M. C. C. R. 277; *Graham v. Sheken*, 16 Legal Intel. 324; *Harrison v. Lemon*, 3 Blackf. 51; *Sutphen v. Cushman*, 35 Ill. 186; *DeWolfe v. Strader*, 26 Ill. 225; *Dow v. Chamberlin*, 5 McLean, 281; *Gordon v. De Golia*, 91 Mich. 370; *Crawford v. Osmen*, 70 Mich.

561; *Reilly v. Brown*, 87 Mich. 163; *Etheridge v. Wisner*, 86 Mich. 166; *McArthur v. Robinson*, 104 Mich. 540.

⁵ *Comstock v. Howard*, Walk. Ch. 110; *Wadsworth v. Loranger*, Har. Ch. 113, 150; *Wetherbee v. Brooks*, 22 Mich. 311; *Batty v. Snook*, 5 Mich. 231; *Emerson v. Atwater*, 7 Mich. 12; *Coules v. Marble*, 37 Mich. 159; *Barber v. Milner*, 43 Mich. 248; *Delahay v. McConnell*, 4 Scam. 157; *Coates v. Woodworth*, 13 Ill. 654; *Miller v. Thomas*, 14 Ill. 428; *Tillson v. Moulton*, 23 Ill. 648; *Dwen v. Blake*, 44 Ill. 135; *Hunter v. Hatch*, 45 Ill. 178; *Smith v. Doyle*, 46 Ill. 451.

⁶ *Van Wert v. Chidester*, 31 Mich. 209; *Streeter v. Tilden*, 45 Mich. 533; *Johnson v. Van Velsor*, 43 Mich. 214; *Bartling v. Brasuhn*, 102 Ill. 441; *Etheridge v. Wisner*, 86 Mich. 166; *McArthur v. Robinson*, 104 Mich. 540.

⁷ *Bartling v. Brasuhn*, 102 Ill. 441;

shown by parol testimony.¹ And where a conveyance is in fact a mortgage, it continues a mortgage, although there may be a change of owners, if each change is coupled with notice of the original transaction.²

If the transaction was in fact a loan or security for money owing, although the conveyance is absolute on its face, still it will be treated as a mortgage, but that fact must be satisfactorily shown.³ Where the evidence of indebtedness is retained by the mortgagee, after receiving a deed, absolute in terms, of the mortgaged premises, and the mortgagee gives back a lease to the grantor, and receives rent, equity will regard the deed as a mortgage.⁴

Courts are inclined to construe a deed with condition to be a mortgage.⁵ Though a deed absolute in form, but intended as a security will leave in the grantor the right of a mortgagor to redeem, it does not follow that he would be entitled to maintain possession until foreclosure.⁶

Though contracts for repurchase contemporaneous with conveyances absolute in form are sometimes strong evidence tending to show that the conveyances are intended to be mortgages, yet where it appears that the parties really intended an absolute sale and contract permitting repurchase, such intention must control, and to ascertain the intention, the court will look beyond the writings to the circumstances surrounding the transaction.⁷

Wilson v. McDowell, 78 Ill. 517; *Muher v. Farwell*, 97 Ill. 56; *McMillan v. Bissell*, 63 Mich. 66, 69; *Johnson v. Van Velsor*, 43 Mich. 208; *Durst v. Murphy*, 119 Ill. 345; *Workman v. Greening*, 115 Ill. 477; *Bearss v. Ford*, 108 Ill. 16; *Bullock v. Battenhousen*, 108 Ill. 28.

¹ *Collar v. Collar*, 75 Mich. 414; *Flynn v. Flynn*, 68 Mich. 20; *Strohauer v. Voltz*, 42 Mich. 417.

² *Brown v. Gaffney*, 28 Ill. 149; *Shaver v. Woodward*, Ib. 277; *Reisgard v. McNeil*, 38 Ill. 400.

³ *Taintor v. Keys*, 43 Ill. 332; *Dwen v. Blake*, 44 Ill. 135; *Farmelee v. Lawrence*, Ib. 405.

⁴ *Ennor v. Thompson*, 46 Ill. 214.

⁵ *Swetland v. Swetland*, 3 Mich. 483; *Cornell v. Hall*, 22 Mich. 377; *Batty v. Snook*, 5 Mich. 231; *Enos v. Sutherland*, 11 Mich. 538; *Abbott v. Gregory*, 39 Mich. 68; *State Bank v. Chapelle*, 40 Mich. 448; *Rosenthal v. Scott*, 41 Mich. 635; see *Heald v. Wright*, 75 Ill. 17; *Knowles v. Knowles*, 86 Ill. 1; *Hancock v. Harper*, 86 Ill. 445.

⁶ *Wetherbee v. Green*, 22 Mich. 311.

⁷ *Stahl v. Dehn*, 72 Mich. 645; *Clark v. Landon*, 90 Mich. 83; *Reed v. Bond*, 96 Mich. 134.

SECTION II.

WHO MAY REDEEM.

The equity of redemption is not only a subsisting estate and interest in the land in the hands of the heirs, devisees, assignees and representatives, strictly so called, of the mortgagor; but it also may be asserted by any other persons who have acquired any interest in the lands mortgaged, by operation of law or otherwise, in privity of title.¹ Such persons have a clear right to disengage the property from all incumbrances, in order to make their own claims beneficial or available. Hence a tenant for life, a tenant by the courtesy, a tenant in dower, a jointress, a reversioner, a remainderman, a judgment creditor, a junior mortgagee, and, indeed, every other person being an incumbrancer, or having a legal or equitable title or lien thereon, may insist upon a redemption of the mortgage, in order to the due enforcement of their respective claims and interests in the lands.² Even a person claiming under a prior or subsequent voluntary conveyance may, as against a mortgagee, redeem.³ When any such person does so redeem, he becomes substituted to the rights and interests of the original mortgagee in the land.⁴

A junior incumbrancer has a right to redeem from a prior mortgage by paying the amount due according to its terms as recorded.⁵

As a general rule, the holder of the legal estate under the mortgagor, is a proper person to redeem, whether he holds as trustee for others or in his own right by a voluntary conveyance from the mortgagor.⁶

¹ *Powers v. Lumber Co.*, 48 Mich. 468; *Baker v. Pierson*, 6 Mich. 522; *Lamb v. Jeffrey*, 47 Mich. 28; *Smith v. Austin*, 9 Mich. 465; 4 Kent's Com. 162; 2 Story's Eq. Jur., § 291; *Up-ham v. Brooks*, 2 W. & M. 408.

² 2 Story's Eq. Jur. § 1023; *Pardee v. Van Auken*, 3 Barb. R. 534; *Kinnoul v. Money*, 3 Swanst. 208; *Downe v. Morris*, 3 Hare, 394.

³ 2 Fomb. Eq. B. 3 Ch. 1, § 8, and note p; 2 Barb. Ch. Pr. 193, 194; *Dunlap v. Wilson*, 32 Ill. 517.

⁴ 2 Story's Eq. Jur., § 1023.

⁵ *Gardner v. Emerson*, 40 Ill. 296; *Holbrook v. Bank*, 2 Curtis, 244.

⁶ *Beach v. Shaw*, 57 Ill. 17; see *Strang v. Allen*, 44 Ill. 428; *Roberts v. Fleming*, 53 Ill. 196.

The complainant must be entitled to the legal estate of the mortgagor, or must claim a subsisting interest under him.¹

A court of equity will not lend its aid to enforce the right of a volunteer to pay off a mortgage on the land of another.²

A wife's dower and homestead rights in land mortgaged by her husband, entitle her not only to redeem from statutory foreclosure sale, but to receive on paying the amount bid, with interest, an assignment of the mortgage.³

Subsequent encumbrancers are not entitled to file a bill simply for the purpose of redeeming from a regular and valid statutory foreclosure.⁴

Upon a bill to redeem from a sale under a power in a trust deed, where the sale was of a character wholly unauthorized by the power, and merely amounted to a private sale, though public in form, the sale was held to be void; and the complainant has a right to redeem.⁵

SECTION III.

WITHIN WHAT TIME TO BE FILED.

As a general rule, there can be no redemption of a mortgage after twenty years from the time of the forfeiture, or of actual, quiet and uninterrupted possession,⁶ unless circumstances are proved by the mortgagor, showing an acknowledgment

¹ *Grant v. Duane*, 9 Johns. 591; *Parvis v. Brown*, 4 Ired. Eq. 413.

² *Smith v. Austin*, 9 Mich. 465; *Smith v. Austin*, 11 Mich. 34; *Harwood v. Underwood*, 28 Mich. 427. See also, as bearing on the subject as to who may redeem: *Stone v. Welling*, 14 Mich. 514; *Goodenow v. Curtis*, (overruling *Schwarz v. Sears*, Walk. Ch. 19), 33 Mich. 505; *Millard v. Truax*, 47 Mich. 251; *Johnson v. Johnson*, Walk. Ch. 331; *Marvin v. Schilling*, 12 Mich. 356; *Carter v. Lewis*, 27 Mich. 241; *Lamb v. Jeffrey*, 41 Mich. 719; *Sager v. Luffer*, 35 Mich. 134; *Gantz v. Toles*,

40 Mich. 726; *Thurston v. Prentiss*, Walk. Ch. 529.

³ *Moore v. Smith*, 95 Mich. 71.

⁴ *Marshall v. Blass*, 82 Mich. 518.

⁵ *Williamson v. Stone*, 27 Ill. App. Ct. R. 214; see *Bergan v. Bennett*, Cai. Cas. 15; *Daniels v. Adams*, 1 Amb. 495; *Hibler v. Hoag*, 1 Watts & Serg. 560; *Crandall v. The State of Ohio*, 28 Ohio St. 479; *Campbell v. Swan*, 2 Barb. 109.

⁶ *Whiting v. White*, Coop. 4; *Demarest v. Wynkoop*, 3 Johns. Ch. 129; *Beckford v. Wade*, 17 Ves. 99; *Slee v. Manhattan Co.*, 1 Paige Ch. 48; *Anon.* 3 Atk. 313; *Moore v. Cable*, 1 Johns. Ch. 385.

of his title by the mortgagee;¹ or unless the mortgagor has labored under some impediment; and even in that case, according to Lord Kenyon's opinion, there can be no redemption after ten years from the time the impediment has been removed.² But it was held in Maryland that an infant is to be allowed twenty years after he becomes of age, to file his bill to redeem.³

Redemption will not be allowed before the time specified in a mortgage, even on tender of the principal of the debt, with interest, to the stipulated time of payment, and costs.⁴

A mortgagor seeking to redeem from a sale of the premises by the mortgagee, under a power in the mortgage, on the alleged ground of a defective notice of the sale and inadequacy of price, must file his bill in apt and reasonable time;⁵ and in such case the whole of the mortgage money must be tendered; not merely the amount of the sale.⁶

SECTION IV.

PARTIES TO.

Complainants.—If the bill is brought by the mortgagor against the mortgagee, there having been no death or assignment on either side, it is, of course, that no other persons need be made parties. If the mortgagor is dead, then his heir, or his devisee, if the estate has been devised, is the proper party to redeem, if it is a mortgage in fee; and if a mortgage for a term of years only, then the personal representative of the deceased.⁷ If two estates are mortgaged, and by the death of the mortgagor, the equity of redemption of the two estates is vested in different persons, all of them must be made parties to a bill to redeem.⁸

¹ *Ins. Co. v. Brown*, 11 Mich. 265; *Curtis v. Goodenow*, 24 Mich. 18; *Goodrich v. Leland*, 18 Mich. 117; *Cargil v. Power*, 1 Mich. 369; *McIlugh v. Wells*, 39 Mich. 175; *Cook v. Finkler*, 9 Mich. 131; *Barron v. Martin*, 19 Ves. 327; *Hodde v. Healey*, Mad. & Geld. 181; *Dexter v. Arnold*, 3 Sum. 152.

² *Beckford v. Wade*, 17 Ves. 99.

³ *Lamar v. Jones*, 3 Har. & McHen. 328; 2 Barb. Ch. Pr. 194–195.

⁴ *Abbe v. Goodwin*, 7 Conn. 377.

⁵ *Hamilton v. Lubukee*, 51 Ill. 415.

⁶ *Collins v. Riggs*, 14 Wallace, 491.

⁷ 2 Barb. Ch. Pr. 195; *Story's Eq. Pl.* § 182.

⁸ *Cholmondeley v. Clinton*, 2 Jac. & W. 1, 2.

If the bill charges that a part of the mortgage, principal and interest, has been paid by the mortgagor, in his lifetime, the personal representative of the mortgagor, as well as his heir or devisee, is a necessary party to the account from what is due on the mortgage.¹ Indeed, as the personal assets are usually first to be applied in exoneration of the real estate mortgaged, it would seem that in a bill by an heir or devisee to redeem, he might properly make the personal representative of the mortgagor a party defendant, in order to have the assets so applied; and thus relieve himself from the burden of the incumbrance.²

If a mortgagor has conveyed his equity of redemption to trustees, for the benefit of his other creditors, the trustees alone are generally the proper parties to a bill to redeem, and not any of the creditors entitled under the trust.³ But a special case may exist, in which such creditors would be entitled to redeem; as, for example, if the trustees should collude with the mortgagee, or should refuse to sue, or should be insolvent.⁴ In such a case the bill should be brought in behalf of all the creditors; for a few could not redeem for their own benefit.⁵

Where the mortgagor has conveyed the estate, subject to the mortgage, and the grantee is to pay off the mortgage, he may maintain a suit to redeem, without making the mortgagor a party. But if the conveyance be of the whole real estate, absolutely free from incumbrances, then the mortgagor should, or at least may be made a party, in order to be bound by the decree, and to assist in taking the account; he being primarily liable to discharge the mortgage. If the assignment is made to several persons jointly, all of them should be parties to the bill to redeem.⁶

To a bill brought by a second or subsequent mortgagee, to redeem either one or all of the antecedent mortgages, the mortgagor or his heir or other proper representative in the realty, is a necessary party; for it is said the natural decree, in such a

¹ S. C., Id. 135; 2 Barb. Ch. Pr. 196.

² Story's Eq. Pl. § 182; 2 Barb. Ch. Pr. 196; *Howell v. Price*, 1 P. Wms. 291; *Bradshaw v. Outram*, 13 Ves. 234; *Duke of Cumberland v. Coddington*, 3 Johns. Ch. 257.

³ Coop. Eq. Pl. 175; *Troughton v. Binkes*, 6 Ves. 573, 575.

⁴ *Troughton v. Binkes*, 6 Ves. 573, 575.

⁵ Id. Ib.; 2 Barb. Ch. Pr. 196.

⁶ *Palmer v. Earl of Carlisle*, 1 Sim. & Stu. 423, 425; *True v. Haley*, 24 Maine, 297; Story's Eq. Pl. § 183.

case, is that the second mortgagee shall redeem from the first mortgagee, and the mortgagor, or his representatives in the realty, shall redeem from him or stand foreclosed. And a court of equity in such case, endeavors to make a complete decree that shall embrace the whole subject, and determine upon the rights of all parties interested in the estate.¹ But in such a case, it seems that the personal representative of the mortgagor would not be a necessary party, even though it might perhaps be competent to make him a party.²

Defendants.—In general terms it may be stated, that all persons ought to be made parties whose interests or rights may be affected by the decree.³ The mortgagee is, of course, the only necessary and proper party in all cases, where there is no other outstanding interest under him. If the mortgage is in fee, and the mortgagee is dead, the heirs of the mortgagee, or other persons in whom the legal estate is vested by devise or otherwise, must be made parties; because they have the legal title, and are to be bound by the decree. And the personal representatives of the mortgagee must also be made parties; because, generally, they are entitled to the mortgage money, when paid, as it is to be returned to the same fund out of which it originally came.⁴ But if the mortgage is of a term of years, created by the owner of the fee, the personal representatives of the mortgagee only, without the heirs, are the proper parties; for they alone are interested in the term, unless the term has been disposed of in favor of third persons; in which case they also should be made parties.⁵

When the mortgage has been absolutely assigned by the mortgagee, without the authority and privity of the mortgagor, it is not necessary, in a bill brought by the latter to redeem, to make any person but the last assignee a party to the bill, however many *mesne* assignments have been made; for, in such a case, the last assignee is understood to have con-

¹ Story's Eq. Pl. § 183; *Thompson v. Baskerville*, 3 Ch. R. 215.

² *Fell v. Brown*, 2 Bro. Ch. R. 278; 2 Barb. Ch. Pr. 196, 197; *Palk v. Clinton*, 12 Ves. 58, 59; *Hobart v. Abbott*, 2 P. Wms. 643.

³ Edwards on Parties, 87-98; Story's Eq. Pl. § 188.

⁴ Story's Eq. Pl. § 188; Coop. Eq. Pl. 37; *Anon.* 2 Freem. 52; *Clarkson v. Bowyer*, 2 Vern. 66; *Dexter v. Arnold*, 1 Sumner, 109.

⁵ *Osborn v. Fallows*, 1 Russ. & Mylne, 741; Coop. Eq. Pl. 37.

tracted not only to stand in the place of the original mortgagee, and to represent him, but also to stand in the place, and as the representative of all the other *mesne* assignees, until the title was taken by himself; and he may accordingly be decreed to convey.¹

But where the mortgagor seeks in his bill an account of rents and profits, or other sums received by the mortgagee before the assignment, the mortgagee should be made a party to the bill, as well as the assignee, for he is a necessary party to the account.²

Where the mortgagee has not assigned his whole interest in the mortgaged property, but he retains an interest in it in part, he is a necessary party, as well as the assignee, to a bill to redeem.³ So, where there are successive mortgages, the second embracing a part only of the estate comprehended in the first, if the second mortgagee brings a bill to redeem the first mortgage, and the equity of redemption of the mortgagor in the different estates has become vested in different persons, all of them should be made parties to the bill, for they are all interested in taking the account.⁴

Where the mortgagee has assigned his whole interest upon certain trusts, the trustee and *cestui's que trust*, or beneficiaries, are equally necessary parties to the bill to redeem.⁵

SECTION V.

TERMS OF REDEMPTION.

A mortgagor can not redeem without paying what is really due; and where a mortgagee buys in an incumbrance, he will be allowed, as against the mortgagor, all that is due upon it, although he may have bought it for less. But it is otherwise if the heir or trustee of a mortgagor buys in an incumbrance

¹ *Hill v. Adams*, 2 Atk. 39; *Chambers v. Goldwin*, 9 Ves. 263, 269; *Bishop v. Beaver*, 3 Ves. 315, 316; *Leanon v. Porter*, 2 Gray, 473.

² *Anon.* 2 Freem. 59; *Lowther v. Carlton*, 2 Atk. 139; *Story's Eq. Pl.* § 190.

³ *Hobart v. Abbott*, 2 P. Wms.

643; *Norrish v. Marshall*, 5 Mad. 475.

⁴ *Palk v. Clinton*, 12 Ves. 48; *Cholmondeley v. Clinton*, 2 Jac. & Walk. 134; *Story's Eq. Pl.* § 191.

⁵ *Whistler v. Webb*, Bumb. 53; *Whetherell v. Collins*, 3 Mad. 255; *Drew v. Harman*, 5 Price, 319.

as against subsequent incumbrancers and creditors; in which case he can only be allowed what he has paid for the incumbrance.¹ A mortgagor filing a bill to redeem must pay the costs of persons defendants claiming under the mortgagee, upon the principle that, at law, the mortgage being forfeited, the mortgagee is at liberty to deal with it as his own property.²

As a general rule, a party coming into a court of equity to redeem, pays costs to the defendant, in addition to the amount due upon the mortgage, although he obtains the relief prayed for;³ yet if the defendant improperly resists the claim of the complainant to redeem, or sets up an unconscientious defense, he will be refused his costs, and may be compelled to pay costs to the adverse party, in the discretion of the court.⁴

There can be no redemption without an allegation of payments, or a tender of the mortgage debt and interest.⁵ But a bill for redemption, which sets forth a liquidation by the parties of the amount due, and a tender and refusal thereof, was held not to be defective for want of an offer to pay what should be found due on account.⁶

Payment may be made or tendered after the day named in the mortgage.⁷ Any attempt to limit or fetter the right to redeem will be held void.⁸

If several are interested in the equity of redemption, and only one is willing to redeem, he must pay the whole mortgage debt.⁹

The tender of the amount due must be absolute; where the complainant offered to pay if the defendant would *re-assign and transfer* to him, it was held insufficient;¹⁰ and not only original consideration but subsequent advances made by the mortgagee

¹ *Darcey v. Hall*, 1 Vern. 18; *Mosier v. Norton*, 83 Ill. 519.

² 2 Barb. Ch. Pr. 199; *Harper v. Ely*, 70 Ill. 581.

³ *Vroom v. Ditmas*, 4 Paige Ch. 526; *Benedict v. Gillman*, Ib. 58; *Slee v. Manhattan Co.*, Ib. 49.

⁴ Id. Ib.; 2 Barb. Ch. Pr. 199.

⁵ *Saunders v. Frost*, 5 Pick. 259; *Bank v. Rose*, 1 Strobh. Eq. 257; *Hooper v. Bailey*, 29 Miss. 333; *Elyman v. Bogue*, 135 Ill. 9.

⁶ *Barton v. May*, 3 Sandf. Ch. R. 450.

⁷ *Rogan v. Walker*, 1 Wis. 527.

⁸ *Robinson v. Farrelly*, 10 Ala. 472; *Henry v. Davis*, 7 Johns. Ch. 40; *Clark v. Henry*, 2 Cow. 324; *Wright v. Bates*, 13 Vt. 341; *Dougherty v. Colgan*, 6 Gill & J. 275.

⁹ *Gibson v. Crehorne*, 5 Pick. 146; *Taylor v. Porter*, 7 Mass. 355; *Smith v. Kelley*, 27 Maine, 237.

¹⁰ *Wendell v. New Hampshire Bank*, 9 N. H. 404.

must be tendered;' nor can the mortgagor insist upon a release.²

A party seeking to redeem a mortgage tainted with usury will be required to pay legal interest on the principle that he who asks equitable relief should do equity, and equity would require him to pay legal interest.³

It is essential to a bill to redeem a mortgage that the complainant should offer to pay the debt, interest and costs, 'and the necessary expenses already incurred in taking steps to enforce the security.'⁴

But it is not essential that he should pay the money due before filing his bill, or that he make any allegation of such offer. Such an offer would, however, entitle him to costs and a suspension of interest.⁵

SECTION VI.

FRAME OF BILL.

A bill to redeem may properly be framed with a double aspect, so that the complainant may avail himself of a tender if his proof thereon shall be sufficient, or failing in that, pray an account and be permitted to pay the amount found due. Regularly, however, the prayer should be in the alternative.⁶

The complainant should offer in his bill to pay the amount due the defendant.⁷

Where another person than the mortgagor files a bill to redeem mortgaged premises, the bill must show that complainant has title, and its derivation, and the interest claimed, so that the defendant may admit or deny it, or refer the question to the court by demurrer.⁸

¹ *Ogle v. Ship*, 1 A. K. Marsh. 287; see *Brown v. Gaffney*, 32 Ill. 251.

² *Loring v. Cook*, 3 Pike, 48.

³ *Snyder v. Griswold*, 37 Ill. 216; *Cushman v. Sutphen*, 42 Ill. 256; see *Gerrish v. Black*, 104 Mass. 400; *Parkhurst v. Cummings*, 56 Maine, 155.

⁴ *Beekman v. Frost*, 18 Johns. 144; S. C., Johns. Ch. R. 288.

⁵ *Shutes v. Woodard*, 57 Mich. 213, 214; *Lucking v. Wessen*, 25 Mich. 443; *Myers v. Yaple*, 60 Mich. 339.

⁶ *Barnard v. Cushman*, 35 Ill. 452; *Dwen v. Blake*, 44 Ill. 135.

⁷ *Gooding v. Riley*, 50 N. H. 400.
⁸ *Beekman v. Frost*, 18 Johns. 148; S. C., 1 Johns. Ch. R. 288.

⁹ *Smith v. Austin*, 9 Mich. 465. See also on this subject, *Sandford v.*

Where a grantor in a deed of trust, after the maturity of the note secured, tenders the amount due thereon to the business manager of the payee, in whose hands the note then is, and the tender is refused, a bill to redeem by the debtor, may be properly filed.¹

A bill filed to set aside a statutory foreclosure sale must be considered as a bill to redeem, whether redemption is prayed for or not.²

No. 152. Bill by heirs at law of mortgagor, against mortgagee, to redeem.

STATE OF MICHIGAN.

The Circuit Court for the County of ——. In Chancery.

To the Circuit Court for the County of ——. In Chancery.

1. Your orators, A B and B B, of, etc., respectfully represent unto this honorable court, that they are the sons and only heirs at law of C B, late of, etc., deceased; that the said C B, in his lifetime, to secure the payment of the principal sum and interest of one certain promissory note for the sum of — dollars, bearing date, etc., and payable — after date, with interest at the rate of — per cent. per annum, signed by the said C B, and payable to one E F, the defendant hereinafter named, on, etc., by a mortgage deed of that date, conveyed to the said E F in fee simple, the following described real property, situate and being in the county of —, in the state of —, to wit (*here insert description*): subject, however, to a condition of defeasance upon the payment of the principal sum and interest aforesaid, according to the tenor and effect of the said promissory note; which said mortgage deed was, on, etc., filed for record in the recorder's office of the said county of —; as by the said mortgage deed, now in the possession or under the control of the defendant, will, when produced, appear; a copy of which is hereto attached and marked "Exhibit A," and is made a part of this bill.

2. Your orators further represent that the principal sum and interest of the said promissory note was not paid at the time the same became due; whereby the estate of the defendant in the said premises became absolute at law; whereupon the defendant entered into possession of the same, and the receipts of the rents and profits thereof, and still retains the same.

3. Your orators further represent that the said C B, on, etc., departed this life, leaving your orators, then infants under the age of twenty-one years, his sons and only heirs-at-law; that your orator, A B, on, etc., attained the age of twenty-one years, and your orator B B, attained the same age on, etc.; that your orators have, from time to time since their majority, applied to the defendant, E F, to be let in to redeem the said mortgaged premises; but there being a considerable amount due upon the said mortgage, they were not then able to pay, and the defendant refused

Flint, 24 Mich. 27; *Avery v. Ryerson*, 34 Mich. 362; *Reynolds v. Green*, 10 Mich. 355; *Hoffman v. Harrington*, 33 Mich. 392.

¹ *Willeman v. Dunn*, 93 Ill. 512.

² *Huyck v. Graham*, 82 Mich. 353.

to permit your orators to redeem the said premises on any other terms than a full payment of all the money, which he alleged to be due him, without deducting the rents and profits received by him while he held the possession of said premises.

4. Your orators further represent that the interest of the said principal sum of — dollars, and all, or the greater part of the principal, have been satisfied and paid out of the rents and profits of the said mortgaged premises, received by the defendant, which are quite considerable; and your orators have lately renewed their requests to the defendant, to permit them to redeem said premises, and to enable your orators to do so, to account with them for the rents and profits of the said premises received by the defendant during the time he has been in the possession of the same, which the defendant refused to do, pretending that your orators have no equity of redemption in the said premises

Forasmuch, therefore, as your orators are without remedy in the premises, except in a court of equity, your orators pray:

I. That the said C D, who is made a party defendant to this bill, may be required to make full and direct answer to the same, *but not under oath, the answer under oath being hereby waived*; and especially that he may be compelled to fully and particularly answer and set forth whether any, and what part, of the said principal sum and interest of the said promissory note, is now due and owing to him on the security of the said mortgaged premises; and particularly how he makes out and computes the same; and whether the yearly rents and profits of the said premises, since the defendant has been in possession thereof, have not been much more, and how much, than sufficient to pay the interest due on the said principal sum, and all, or a considerable, and what, part thereof, or how otherwise;

II. That the defendant may answer and fully set forth at what yearly rent or rents the said mortgaged premises have, or might have, been let, since he has been in possession thereof; and whether he has not, or, without his willful neglect or default, might not have received the whole of the rents and profits, of the said mortgaged premises, since he has been in possession thereof, and if not, why not;

III. That an account may be taken, under the direction of the court, of what is now due and owing to the defendant for the principal sum and interest aforesaid;

IV. That an account may be taken of the rents and profits of the said premises, received by the defendant, or by any other person on his behalf, or which, without his willful neglect or default, might have been received by him since he entered into the possession of said premises;

V. That in taking such account, rests may be made, from time to time, when and as the rents and profits shall appear to have exceeded the interest in arrear;

VI. That upon the payment by your orators of what, if anything, shall be found remaining due to the defendant, in respect of the said principal sum and interest, which your orators hereby offer to pay, the defendant may be decreed to surrender and deliver up the possession of the said mortgaged premises to your orators; and that the defendant may be compelled to release said mortgage upon the records of said county;

VII. That your orators may have such other and further relief as equity may require, and to this honorable court shall seem meet.

(Add prayer for process.)

Sol. for Complainant.

(Attach "Exhibit A.")

No. 153. Bill to redeem from a deed absolute on its face, but which was intended as a mortgage.

STATE OF MICHIGAN.

The Circuit Court for the County of _____. In Chancery.

To the Circuit Court for the County of _____. In Chancery.

1. Your orator, A B, of, etc., respectfully represents unto the court, that on, etc., your orator being indebted unto one C D, of, etc., the defendant hereinafter named, in the sum of _____ dollars, to secure the same, with interest thereon at the rate of _____ per cent. per annum, to be paid on, etc., by an absolute deed of conveyance of that date, conveyed to the said C D in fee simple, the following described real property, to wit (*here insert the description*): which said deed was, on, etc., duly filed for record in the recorder's office of the said county of ____; as by the said deed, now in the possession or under the control of the said C D will, when produced, appear; a copy of which is hereto attached, and marked "Exhibit A," and is made a part of this bill of complaint.

2. Your orator further represents, that the said deed of conveyance, although appearing to be absolute on its face, was not intended to be such by your orator and the said C D, but on the contrary thereof, it was expressly agreed and understood between them, that the same, and the said premises thereby conveyed, were to be held by the said C D simply as a security for the payment of the said sum of money, and interest as aforesaid: and that upon the payment of that sum and interest to the said C D, the said C D would reconvey the said premises to your orator by an absolute deed.

3. Your orator further represents that the said C D, on etc., entered into the possession of the said premises, and the receipt of the rents and profits thereof, and still retains the same.

4. Your orator further represents, that he has paid all the interest due on the said sum of _____ dollars, to the said C D, from the date of the said deed until, etc., when the said C D refused to receive further interest thereon from your orator: that your orator has always been, and still is, ready to pay the said C D what is due to him for principal and interest on the said sum of money; and your orator well hoped that the said C D would have received the same, and that he would reconvey to your orator the said premises as in justice and equity he ought to have done.

5. But now so it is, may it please your honor, he, the said C D, in order to deprive and defeat your orator of the benefit of redeeming the said premises, does pretend and give out that your orator did not execute the said deed of conveyance to the said C D as a security for the repayment of the said sum of money, with interest as aforesaid, but does pretend that the said sum of _____ dollars was paid to your orator in consid-

eration of the absolute purchase of the said premises; and that the said deed was not intended between the parties thereto to be a mere security for the said sum of money, and interest as aforesaid; whereas, your orator charges the contrary of such pretenses to be the truth; and upon the pretenses aforesaid, the said C D refuses to come to any manner of account with your orator, or to reconvey the said premises to him, although your orator has frequently, and in a friendly manner, applied to him for that purpose, and offered to pay him whatever, if anything, should be found to be due to the said C D upon an account being taken with reference to the said transaction. All of which actings, doings and pretenses of the said C D are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of your orator.

Forasmuch, therefore, as your orator is without remedy in the premises, except in a court of equity, your orator prays:

I. That the said C D, who is made a party defendant to this bill, may be required to make full and direct answer to the same, *but not under oath, the answer under oath being hereby waived.*

II. That an account may be taken under the direction of this honorable court, of what is now due and owing to the defendant for the principal sum and interest aforesaid.

III. That an account may also be taken of the rents and profits of the said premises, received by the defendant, or by any other person on his behalf, or which, without his willful neglect or default, might have been received by him since he entered into the possession of said premises.

IV. That, in taking such account, rests may be made from time to time, when and as the rents and profits shall appear to have exceeded the interest in arrear.

V. That upon the payment by your orator of what, if anything, shall be found remaining due to the defendant in respect of the said principal sum and interest, which your orator hereby offers to pay, the defendant may be decreed to surrender and deliver up the possession of the said premises to your orator.

VI. That the defendant may be compelled to reconvey the said premises to your orator by sufficient and proper deed of conveyance in fee.

VII. That he be compelled to surrender to your orator all deeds, writings and tax receipts pertaining to said premises.

VIII. And that your orator may have such other and further relief as equity may require and to your honor shall seem meet.

May it please, etc. (*Pray for process as in No. 114, ante.*)

No. 154. Bill to redeem goods which were deposited as a security for money lent.

STATE OF MICHIGAN.

The Circuit Court for the County of ——. In Chancery.
To the Circuit Court for the County of ——. In Chancery.

1. Your orator, A B, of, etc., respectfully represents unto the court, that your orator having occasion for a sum of money for the purpose of his business, made application to one C D, of, etc., the defendant hereinafter named, to lend him the same, and thereupon the said C D, on or about

——, advanced and lent to your orator the sum of —— dollars, and in order to secure the repayment thereof, with interest at the rate of — per cent. per annum, your orator deposited with the defendant the following described property, to wit (*Here describe it*): which was of the value of —— dollars and upwards, and at the same time executed and delivered to the defendant a bill of sale of the said goods and chattels so deposited with him, but it was not meant and intended thereby, either by your orator or the defendant, that the said transaction should amount to an absolute sale of the said goods and chattels to the defendant, but it was expressly agreed between your orator and the defendant that your orator should, nevertheless, be at liberty to redeem the same.

2. And your orator further represents, that being desirous to redeem the said goods and chattels, he has repeatedly applied to the defendant and has offered to repay him the said sum of —— dollars, with lawful interest thereon, on having said goods and chattels redelivered to him; with which just and reasonable requests your orator well hoped that the defendant would have complied, as in justice and equity he ought to have done. But now so it is, may it please your honor, he, the said C D, denies that said property was delivered to him as a security, and refuses to allow your orator to redeem the same, or to redeliver the said property to your orator.

Forasmuch, therefore, as your orator is without adequate remedy in the premises, except in a court of equity:

I. Your orator prays that the said C D, who is made party defendant to this bill, may be required to make full and direct answer to the same, *but not under oath, the answer under oath being hereby waived*;

II. That an account may be taken of what is due to the defendant, for principal and interest, in respect to the said loan of —— dollars;

III. That upon payment thereof, by your orator, which he hereby offers to pay, the defendant may be decreed to deliver over to your orator the said goods and chattels so deposited with him as aforesaid;

IV. And that your orator may have such other and further relief in the premises as equity may require and to the court shall seem meet.

(*Pray process.*)

——, ———,
Sol. for Complainant.

No. 155. Bill to set aside a decree of foreclosure, etc., by heir of mortgagor against mortgagee.

STATE OF MICHIGAN.

The Circuit Court for the County of —— In Chancery.

To the Circuit Court for the County of —— In Chancery.

1. Your orator, A B, of, etc., respectfully represents unto this honorable court, that B B, late of, etc., now deceased, in his lifetime, on, etc., executed a mortgage deed in fee simple to one C D, the defendant hereinafter named, upon the following described premises, to wit (*Here insert description*): which said mortgage was made to secure the payment of a certain promissory note of the same date, for the sum of —— dollars, payable to the defendant —— after date, which said mortgage was recorded in the recorder's office of said county, on, etc., as will more fully appear from a copy of said mortgage hereto attached and marked "Exhibit A."

2. Your orator further represents that the said B B departed this life on, etc., leaving your orator, his son and only heir at law, then of about the age of ——— years.

3. Your orator further represents, that during his minority, and on, etc., the defendant filed his bill of complaint in this court against your orator, for a foreclosure of his right of redemption in the said mortgaged premises; but your orator was not represented in such bill to be then an infant; and the defendant caused and procured one E F, since deceased, who had acted as the solicitor in the management of your orator's said father's affairs in his lifetime, to put in an answer in the name of your orator, and without ever acquainting your orator or any of his friends or relations thereof; in which said answer a much greater sum was stated to be due from your orator, upon the said promissory note and mortgage, to the defendant, than in fact was really owing to him, and for which it was untruly stated that the said mortgaged premises were an insufficient security; and in consequence of such answer being put in, the defendant afterward, on, etc., in conjunction with the said E F, obtained an absolute decree of foreclosure against your orator; which your orator has only discovered, and of which he had no notice; and in which said decree no day was given to your orator, who was an infant when the same was rendered, to redeem when he became of the age of twenty-one years; as by the record and proceedings of the said foreclosure now remaining in this court, reference thereto being had, will more fully appear.

4. Your orator further represents, that he attained the age of twenty-one years on, etc.; and shortly afterward, having discovered that such transactions had taken place during his minority as aforesaid, by himself and his agent represented the same to the defendant, and requested him to deliver up possession of the said mortgaged premises to your orator, upon being paid the principal sum and interest, if any, actually and fairly due thereon, which amount your orator tendered, and has already been ready to pay, and which would have been paid by the personal representatives of the said B B, out of his personal assets, during your orator's minority, had any application been made for that purpose, but this the defendant refused to do.

Forasmuch, therefore, as your orator is without remedy in the premises, except in a court of equity, your orator prays :

I. That the said C D, who is made party defendant to this bill, may be required to make full and direct answer to the same, *but not under oath, the answer under oath being hereby waived;*

II. That the said decree of foreclosure may be set aside, and be declared to be null and void;

III. That an account may be taken of what, if anything, is now due to the defendant for principal and interest on said promissory note and mortgage;

IV. That an account may also be taken of the rents and profits of said mortgaged premises, which have or might have been received by or on behalf of the defendant since he came in possession thereof; and if the same shall appear to have been more than the principal and interest due, then that the residue thereof may be decreed to be paid to your orator;

V. That your orator may be at liberty to redeem the said mortgaged

premises on payment of the principal sum and interest, if any, remaining due on the said security;

VI. That the defendant may be decreed, on being paid such principal sum and interest, which your orator hereby offers to pay, to deliver up the possession of said mortgaged premises, free from all encumbrances, to your orator;

VII. That the said mortgage may be fully satisfied and released of record; and

VIII. That your orator may have such other and further relief in the premises as equity may require and to the court shall seem meet.

(*Pray process.*)

Sol. for Complainant.

SECTION VII.

DECREE.

If the mortgagor is permitted to redeem, the decree directs a reference to a commissioner to ascertain and report the amount due for principal and interest, and orders the complainant to pay that amount within a specified time after the confirmation of the master's report, together with the costs; and that upon him so doing, the mortgagor shall convey to him the mortgaged premises. And it directs that upon the complainant's default, within the time specified, the bill be dismissed. It is not proper to order a sale of the premises on default of payment.¹

Michigan practice.—In Michigan the practice on bills to redeem is against strict foreclosure in case of default, and sale as on foreclosure is ordered should the redemption money not be paid as decreed.²

The time allowed for the redemption is not fixed and certain, but rests in the sound discretion of the court, to be regulated by circumstances.³ The usual time allowed however is six months.⁴ And, in general, the time allowed will not be afterward extended.⁵

¹ Daniell's Chan. Pr. 644; 2 Jones on Mtgs. §§ 106, 1107; *Pilman v. Thornton*, 66 Maine, 469; *Decker v. Patton*, 120 Ill. 461; see *Hollingsworth v. Koon*, 117 Ill. 51.

² *Meigs v. McFarland*, 72 Mich. 194; *Huyck v. Graham*, 82 Mich. 353; *Fasdick v. VanHusen*, 21 Mich.

567; *Goodenow v. Curtis*, 33 Mich. 505; *Grover v. Fox*, 36 Mich. 461; *Adams v. Cameron*, 40 Mich. 506; *Newkirk v. Newkirk*, 53 Mich. 525.

³ *Cameron v. Adams*, 31 Mich. 426.

⁴ *Bremer v. Dock Co.*, 127 Ill. 464.

⁵ *Parks v. Allen*, 42 Mich. 482.

No. 156. Decree for redemption.

(Caption and title of cause, as in No. 97, ante.)

This cause having come on to be heard upon the bill of complaint herein, the answer of the defendant thereto, the replication of the complainant to such answer, and the proofs taken in said cause, and having been argued by counsel for the respective parties; and the court being fully advised in the premises, doth find: that the allegations in the said bill contained are true as therein stated; and that the equities of this cause are with the complainant.

It is therefore ordered, adjudged and decreed, by the court, that this cause be referred to a commissioner of this court, to take an account of what is due to the defendant for principal and interest on the said mortgaged indebtedness in the bill of complaint mentioned; and also to take an account of the rents and profits of the said mortgaged premises, which have come to the hands of the defendant, or of any other person or persons by his order, or for his use, or which he, without his willful default, might have received; and what shall be coming on the said account of rents and profits, is to be deducted out of what shall be found due to the defendant for principal and interest. And for the better taking of the said account, the parties are to produce before, and leave with the said commissioner, all deeds, books, papers, tax receipts, and writings in their possession or power, relating thereto, and are to be examined on oath as the said commissioner shall direct. And the said commissioner will cause to come before him, all such witnesses whose testimony he may deem necessary in the taking of the said accounts, and examine them upon oath and interrogatories touching the matters aforesaid. And what upon the balance of the said account shall be certified to be due to the defendant, for his principal and interest, and costs, it is *ordered, adjudged and decreed*, that the complainant do pay to the defendant within — after the said commissioner shall have made his report, and the same shall have been confirmed; and that upon such payment being made, the defendant do re-surrender the said mortgaged premises, to wit (*Here describe the premises*): unto the complainant, or unto such person or persons as he shall direct, free and clear of all incumbrance done by him, or any person claiming by, from, or under him, and deliver unto the complainant all deeds and writings in his custody or power, relating to the said mortgaged premises. But in default of the complainant's paying unto the defendant what shall be so certified to be due him for principal, interest and costs as aforesaid, after such deductions made thereout as aforesaid, at the time above mentioned, it is ordered, adjudged and decreed, that the complainant's bill do from thenceforth stand dismissed out of this court with costs to be taxed.

CHAPTER XXIX.

BILLS TO FORECLOSE MORTGAGES.

- Section 1. GENERAL NATURE OF.
2. WHEN PROPER.
3. PARTIES.
4. FRAME OF BILL.
5. PRACTICE ON FORECLOSURE BILLS.
6. DEFENSES TO.
7. DECREES AND SALE.
8. SURPLUS AND DEFICIENCY.*
9. INSTALLMENT DUE, PROCEEDINGS ON.
10. STRICT FORECLOSURE.

SECTION I.

GENERAL NATURE OF.

A foreclosure in equity is a proceeding by which the mortgagor's right of redemption in the mortgaged premises is forever barred and foreclosed. This takes place when the mortgagor has forfeited his estate by non-payment of the money due on the mortgage at the time appointed, but still retains the equity of redemption; in such case the mortgagee may file a bill in a court of equity, to compel the mortgagor to redeem his estate presently, or, in default thereof, to be forever closed or barred from any right of redemption.

There are two general methods of foreclosing an equity of redemption, after a breach of condition, through the medium of a bill in chancery. The one a *strict foreclosure*, as it is commonly called, whereby, after certain proceedings, the mortgagee is adjudged absolute owner of the property, to which he had before only a conditional or defeasible title; the other, and the most usual mode, a *sale of the property* under the direction of an officer of the court, in which case the proceeds are applied to the discharge of incumbrances according to priority, and the balance, if any, paid over to the mortgagor.

The statute of Michigan¹ has also provided a mode of foreclosure of mortgages by advertisement. But this statutory proceeding can not be resorted to safely in every instance. And it may be remarked, generally, that where there are numerous or conflicting interests to be affected, or any complication, the safest mode of foreclosure is by bill in chancery.²

SECTION II.

WHEN PROPER.

If the mortgagor has made default in the payment of the money due according to the terms of the mortgage, or has incurred a forfeiture by reason of any other provision of the instrument, the mortgagee may file his bill to foreclose.

The legal owner of the debt is the legal holder of the mortgage. Only the legal holder of a mortgage can foreclose it *at law*.³ And after a bill is filed, and is pending, no proceedings can be had at law for the recovery of the debt secured by mortgage, or any part of the same, unless permitted by the court.⁴ And the court will only grant permission in unusual cases. But the commencement of a suit at law on a bond or note accompanying a mortgage, will not prevent the filing of a bill for foreclosure. Still, if a party after commencing such suit, begins foreclosure proceedings, he can not proceed with his suit at law without the court's permission.⁵

A pending foreclosure in chancery is no defense to a suit at law, on the merits. But, as the legal proceeding is forbidden without leave of the court, proceedings may be stayed in the suit at law before trial on motion.⁶

The statute provides⁷ that if it appears that any judgment has been obtained in a suit at law, for the moneys demanded by a bill of foreclosure, or any part thereof, no proceedings shall be had in such case, unless to an execution against the property of the defendant in such judgment, the sheriff or other proper officer shall have returned that the execution is

¹ How. Stat. § 8497.

² *Olcott v. Crittenden*, 68 Mich. 230.

³ *Lee v. Clary*, 38 Mich. 223.

⁴ How. Stat. § 6703; *Joslin v. Milspough*, 27 Mich. 517; *Innes v. Stew-*

art, 36 Mich. 285; *Goodrich v. White*, 89 Mich. 489.

⁵ *Suydam v. Bartle*, 9 Paige 274.

⁶ *Ibid*.

⁷ How. St. § 6706; see Walk. Ch. 387; *Cooper v. Bresler*, 9 Mich. 534.

unsatisfied, in whole or in part, and that the defendant has no property whereof to satisfy such execution, except the mortgaged premises.

It is questionable whether this section of the statute applies to the case of a bill to foreclose the defendant's equity of redemption in lands which have been conveyed to the complainant by warranty deed, by way of security.¹

If one mortgage secures several distinct payments, those first falling due have no preference over the others. All will be paid ratably out of the land.² An assignor may give priority of payment, or he may stipulate that no interest in the mortgage shall pass.³ If an assignment is taken as security, it will affect the amount of the decree only, and not the right to maintain the bill.⁴ And one owning several mortgages securing the same debt, can foreclose separately until his debt is satisfied.⁵

A transfer of a debt, transfers with it the mortgage. And if the debt is extinguished, so is the mortgage.⁶ Such an assignment can only be foreclosed in equity, the statute requiring assignments of mortgages to be recorded.⁷

A foreclosure bill will lie when the interest of a mortgage is made payable annually, and is in arrear, and this without waiting for the principal to become due.⁸ But when a mortgage was given to secure several notes, made payable at different times, with authority to make sale of the premises upon the non-payment at maturity of any of the notes for the satisfaction of *such of them as should then be due*, if the mortgagee resorts to equity to foreclose, he can only obtain foreclosure for such of the notes as shall have become due, as

¹ *Maynard v. Pereault*, 30 Mich. 160.

² *Cooper v. Ulmann*, Walk. Ch. 251; *Wilcox v. Allen*, 36 Mich. 161; *McCurdy v. Clark*, 37 Mich. 445; *English v. Carney*, 25 Mich. 178; *Brown v. Thompson*, 29 Mich. 72; *Van Aken v. Gleason*, 34 Mich. 477; *Miles v. Skinner*, 42 Mich. 181; *Bridgman v. Johnson*, 44 Mich. 491.

³ *Cooper v. Newman*, Walk. Ch. 251.

⁴ *McKinney v. Miller*, 19 Mich. 143.

⁵ *Ibid.*

⁶ *Martin v. McReynolds*, 6 Mich. 70; 13 Mich. 395-6; *Baily v. Gould*, Walk. Ch. 484; *Dougherty v. Randall*, 3 Mich. 581; *Briggs v. Hannonwald*, 35 Mich. 474.

⁷ How. St. § 5675.

⁸ *Dederick v. Barber*, 44 Mich. 19; *Morganstein v. Kleis*, 30 Ill. 422; *Ruggles v. S. M. R. R. Co.*, 5 Chicago Legal News, 110; see *Williamson v. New Albany & S. R. R. Co.*, 2 Red. Railw. § 235.

that is the limit of the power of sale in the mortgage.¹ And a foreclosure in such case, for the part of the debt which was due would, of necessity, be a release of the security for the amount not due.² And in such case, the purchase of the premises by the mortgagee and holder of the notes not due, would operate as a satisfaction of the entire debt.³

The assignee of a note is in equity regarded as the purchaser of all the securities and remedies attached to it, and may pursue them at his discretion. So may the assignees in succession, of separate parts of the same debt; and the assignee of the first due of several notes secured by mortgage has a priority of claim, and can foreclose and sell. And the holder of the other notes can redeem in succession, according to priority.⁴

A foreclosure of a mortgage can not take place as to one portion of the mortgaged premises, and not as to the residue. So long as the mortgagor is suffered to remain in possession of any part of the premises, his right of redemption to the whole will continue.⁵

A mortgage given to secure notes which have been allowed to run after maturity, may be foreclosed at any time within the period of limitations for the recovery of real estate.⁶ Equity can give relief for every breach of the condition in a mortgage, whether the parties have seen fit to provide for it or not by power of sale.⁷

In this State, a mortgage is no longer, as at common law, a grant of the land to the mortgagee, defeasible upon condition subsequent, and to become absolute on failure to pay at the specified day. It conveys no title, legal or equitable to the mortgagee, and gives no right of possession without foreclosure.⁸ It is a mere security for the debt.⁹

¹ *Smith v. Smith*, 32 Ill. 193.

² *Ib.*; see *Hards v. Burton*, 79 Ill. 504.

³ *Mines v. Moore*, 41 Ill. 273.

⁴ *Vansant v. Allmon*, 23 Ill. 31; *Schultz v. Bank*, 141 Ill. 116.

⁵ *Spring v. Haines*, 21 Maine, 126.

⁶ *Det. Sav. Bank v. Truesdail*, 38 Mich. 481; *McKinney v. Miller*, 19 Mich. 143.

⁷ *Butler v. Ladue*, 12 Mich. 180;

Cowles v. Marble, 37 Mich. 158; see *Vansant v. Allmon*, 23 Ill. 31; *Hards v. Burton*, 79 Ill. 504; *Ottawa N. P. R. Co. v. Murray*, 15 Ill. 336; *Harper v. Ely*, 56 Ill. 179.

⁸ *Ladue v. D. & M. R. R. Co.*, 13 Mich. 394; *Carruthers v. Humphrey*, 12 Mich. 270; *Hoggsett v. Ellis*, 17 Mich. 351; *Lillibridge v. Tregent*, 30 Mich. 105.

⁹ *Ibid.*

A conveyance of all one's right and title in land will pass the grantee's interest in a mortgage on the same, and a full assignment of a mortgage transfers all collateral rights.¹ An assignee takes subject to all the equities of the original parties to a mortgage, which arise out of the mortgage,² but if the security is negotiable paper in the hands of a *bona fide* owner, the equities do not follow it.³ A written assignment is unnecessary to transfer the title to a mortgage.⁴ A power of sale is no necessary part of a mortgage, and a defect in it does not affect the validity of the mortgage.⁵

SECTION III.

PARTIES.

Complainants.—It may be stated, as a general rule, that all those who have an interest in the mortgage and may be affected by the decree, are proper parties. One holding the equitable title may foreclose, but the party having the legal title should be made a party.⁶ So far as mere legal rights are concerned, the only proper parties are the mortgagor and mortgagee, and those who have acquired rights and interests under them subsequent to the mortgage.⁷

If the mortgagee alone has any interest, he is of course the only necessary party complainant. If the mortgagee is deceased, the bill should be brought in the name of the executor or administrator, and not of the heirs.⁸

¹ *Byles v. Lawrence*, 35 Mich. 529; *Niles v. Ransford*, 1 Mich. 333; *Fletcher v. Carpenter*, 37 Mich. 412; *Haescig v. Brown*, 34 Mich. 504; *Briggs v. Hannowald*, 35 Mich. 474.

² *Nichols v. Lee*, 10 Mich. 526; *Terry v. Tuttle*, 24 Mich. 203; *Judge v. Vogel*, 38 Mich. 568; *Dutton v. Ives*, 5 Mich. 515; *Bloomer v. Lenderson*, 8 Mich. 395.

³ *Reeves v. Scully*, Walk. Ch. 248; *Cooper v. Ullmann*, Walk. Ch. 251; *Dutton v. Ives*, 5 Mich. 515; *Lillibridge v. Tregent*, 30 Mich. 105.

⁴ *Pease v. Warren*, 29 Mich. 9; *Thayer v. McGee*, 20 Mich. 195.

⁵ *State Bank Bay City v. Chappelle*, 40 Mich. 447.

⁶ *Martin v. McReynolds*, 6 Mich. 70; *Morey v. Forsythe*, Walk. Ch. 465; *Fisher v. Miester*, 24 Mich. 447.

⁷ *Chamberlain v. Lyell*, 3 Mich. 459.

⁸ *Roath v. Smith*, 5 Conn. 133; *Freaker v. Horsley*, 2 Freem. 180; *Bradshaw v. Outram*, 13 Ves. 234; *Griffin v. Lovell*, 42 Miss. 403; *Bank v. Dayton*, 116 Ill. 260.

The statute provides¹ that when any mortgagee of real estate, or any assignee of such mortgage, shall die without having foreclosed the equity of redemption, all the interest in the mortgaged premises conveyed by such mortgage, and the debt secured thereby, shall be considered as personal assets in the hands of the executor or administrator, and he may foreclose the same, and have any other remedy for the collection of such debt which the deceased could have had if living, or may continue any proceeding commenced by the deceased for that purpose.

A legatee may foreclose a mortgage which has been specifically bequeathed.²

If the mortgagee has assigned absolutely, and divested himself of all interest, he need not be made a party.³

If the mortgagee has assigned the mortgage as security or pledge for a loan on a less amount than the mortgage, he may, especially where the assignee refuses to proceed, file a bill of foreclosure in his own name.⁴ The assignee also has the right to file a bill in such a case, if he chooses.⁵

An assignee, who took an assignment merely as a security for a debt, which has been paid, can not maintain a bill of foreclosure.⁶

Payment of a first mortgage by a second mortgagee, makes him in equity an assignee of the prior securities, and entitled to all of the remedies.⁷ Partners need not be joined as complainants in the foreclosure of a mortgage given to only one of the firm as trustee of the partnership. A mortgage conditioned for the support of the mortgagee by the mortgagor, can not be foreclosed for the benefit of persons who have boarded the mortgagee at the mortgagor's request.⁸

Defendants.—All persons having an interest in the equity of redemption should be made defendants to a bill of fore-

¹ How. Stat., § 5880; *Albright v. Cole*, 30 Mich. 359.

² *Proctor v. Robinson*, 35 Mich. 284.

³ *Whitney v. McKenney*, 7 Johns. Ch. 144; *Hahn v. Huber*, 83 Ill. 243.

⁴ *Norton v. Warren*, 3 Edw. 106.

⁵ *Ib.*

⁶ *Wilbur v. Almy*, 12 How. U. S. 180.

⁷ *Mattison v. Marks*, 31 Mich. 421; *Russell v. Howard*, 2 McLean, 489; *Donner v. Fox*, 20 Vt. 388.

⁸ *Daniels v. Eisenlord*, 10 Mich. 454.

closure.¹ And if the equity of redemption belongs to different persons as devisees, or as having charges as legatees thereon, all of them should be joined as defendants.² And hence the general, though not universal, rule is that all incumbrancers should be made parties, if not indispensable, at least as proper parties to such a bill, whether they are prior or subsequent incumbrancers.³

The mortgagor, unless he has assigned the equity of redemption, is an indispensable party, and if he has died without transferring or devising the equity of redemption, the heir then becomes a necessary party, and no decree can be entered until the heirs are before the court.⁴

The wife of the mortgagor, who has joined in the execution of the mortgage, is a necessary party to a proceeding in equity to a foreclosure.⁵ But upon a foreclosure of a mortgage given to secure the purchase money for the mortgaged premises, it was not necessary that the wife of the mortgagor should be made a party to the bill.⁶

The statute⁷ says that: "If the mortgage debt be secured by the obligation or other evidence of debt of any other person besides the mortgagor, the complainant may make such person a party to the bill, and the court may decree payment of the balance of such debt remaining unsatisfied, after a sale of the mortgaged premises, as well against such other person as the mortgagor and may enforce such decree as in other cases."

¹ Story's Eq. Pl. § 182, 193; *Hoxie v. Carr*, 1 Sum. 173; *Slade v. Riggs*, 3 Hare. 35; *Coles v. Forrest*, 10 Beav. 552; *Montgomery v. Brown*, 2 Gilm. 531; *Mulvey v. Gibbons*, 87 Ill. 367; *Bank v. Bronson*, 14 Mich. 362; *Horton v. Ingersoll*, 13 Mich. 409; *Woods v. Love*, 27 Mich. 308. ² *McGown v. Yorks*, 6 Johns. Ch. 450.

³ *Haines v. Beach*, 3 Johns. Ch. 459; *Ensforth v. Lambert*, 4 Ib. 605; *Cullum v. Batre*, 2 Ala. 415; *Finley v. Bank*, 11 Wheat. 304; *Walsh v. Truesdall*, 1 Bradwell's App. Ct. R. 126.

⁴ *Lane v. Erskine*, 13 Ill. 501;

Harvey v. Thornton, 14 Ill. 217; *Marsh v. Green*, 79 Ill. 385; *Mich. Ins. Co. v. Brown*, 11 Mich. 265.

⁵ *Shoemaker v. Gardner*, 19 Mich. 93; *Leonard v. Villars*, 23 Ill. 377; *Wright v. Langley*, 26 Ill. 381; see *Pope v. North*, 33 Ill. 440.

⁶ *Auphlett v. Hibbard*, 29 Mich. 298; *Stephens v. Bicknell*, 27 Ill. 444; *Short v. Raub*, 81 Ill. 509; *Fletcher v. Holmes*, 32 Ind. 497.

⁷ Comp. L. 1871, § 5150; How. St. § 6704; see also *Crawford v. Edwards*, 33 Mich. 354; *Curtis v. Allen*, 9 Paige, 432; *Burr v. Beers*, 24 N. Y. 178.

If a person when purchasing premises agrees in the deed to pay existing mortgages on the land, both he and the mortgagor may be treated as principal debtors, and a personal decree against either or both may be had.¹ But where a grantee purchases the premises subject to the incumbrances he does not become personally liable.² When the grantee assumes the mortgage, he is not a necessary party unless a personal decree is sought.³

When a mortgagor, or other person liable personally for deficiency, shall die, it is proper to make the personal representatives parties in order to obtain a decree to pay the deficiency out of the estate in their hands.⁴ A purchaser of land from a devisee is a necessary party to a bill for the foreclosure of a mortgage, which had previously been given upon the same premises by the testator.⁵

Where three notes, payable at different times, were secured by a mortgage, and the first and second notes were assigned to one person, and the third note to another, it was held that on a bill to foreclose the mortgage by the holder of the first and second notes, the holder of the third note was a necessary party.⁶

A mortgagor who is personally liable to the mortgagee for the payment of the debt secured by the mortgage, but who has parted with all his rights and interest in the mortgaged premises, is a proper, but not a necessary party to a bill to foreclose the mortgage.⁷

A foreclosure suit is not the proper way to litigate and settle the rights of parties who set up legal titles, which, if valid, are adverse to the title of the mortgagor and mortgagee.⁸

¹ *Crawford v. Edwards*, 33 Mich. 354; *Miller v. Thompson*, 34 Mich. 10; *Carley v. Fox*, 38 Mich. 387; *Turner v. McCarty*, 22 Mich. 265; *Winans v. Wilkie*, 41 Mich. 264; *Higman v. Stewart*, 38 Mich. 523; *Taylor v. Whitmore*, 35 Mich. 97.

² *Winans v. Wilkie*, 41 Mich. 264; *Booth v. Ins. Co.*, 43 Mich. 299.

³ *Miller v. Thompson*, 34 Mich. 10.

⁴ *Abbott v. Godfroy Heirs*, 1 Mich. 179.

⁵ *Ohling v. Luitjens*, 32 Ill. 23; *Dunlap v. Wilson*, Ib. 517; *Cutter v. Jones*, 52 Ill. 84.

⁶ *Myers v. Wright*, 33 Ill. 285.

⁷ *Bigelow v. Bush*, 6 Paige, Ch. 343; *Marsh v. Green*, 79 Ill. 385.

⁸ *Chamberlain v. Lyell*, 3 Mich. 448; *Wright v. Dudley*, 8 Mich. 115; *Horton v. Saunders*, 13 Mich. 109; *Bank v. Bronson*, 14 Mich. 361; *Comstock v. Comstock*, 24 Mich. 39; see also *Summers v. Browley*, 28 Mich. 443; *Wilkinson v. Green*, 34

But when an adverse claimant owns an interest in the equity of redemption, he may properly be made a party in order to foreclose that interest.¹

If the mortgagor has conveyed the equity of redemption absolutely and without warranty, the mortgaged premises are the primary fund for the payment of the mortgage debt; and the grantee has no right to object that the mortgagor is not made a party to the bill of foreclosure. But where the complainant makes a mere surety of the mortgagor for the payment of the debt, a party to the bill, for the purpose of obtaining a decree against such surety, if the mortgaged premises are found to be insufficient to satisfy the debt and costs, such surety has a right to insist that the principal debtor shall be made a party to the suit, if he is within the jurisdiction of the court, but not if the principal debtor is an absentee, and has assigned all his right and interest in the equity of redemption.²

Where the mortgagee has assigned his bond and mortgage, and guaranteed the collection of the debt, the assignee may make him a party to the bill of foreclosure, for the purpose of obtaining a decree over against him for the deficiency, in case the amount of such deficiency should not be collected from the mortgagor.³

All parties to a joint and several note must be made defendants to a bill to foreclose a mortgage given to secure the same, even though the mortgage was made by one of them.⁴ Minors whose guardian has assigned a mortgage which he held for them, need not be made parties by the assignee.⁵ A guarantor of the collection of a debt secured by mortgage is not a proper party.⁶ But purchasers of land on execution sale should be made parties.⁷ If a mortgage is foreclosed without making

Mich. 221; *Tower v. Devine*, 37 Mich. 443; *Wanzer v. Blanchard*, 3 Mich. 11; *Adams v. Bradley*, 12 Mich. 346; *Allen v. Mills*, 26 Mich. 123; *Bell v. Pate*, 47 Mich. 469.

¹ *Bank v. Bronson*, 14 Mich. 361; *Horton v. Ingersoll*, 13 Mich. 103.

² 2 Barb. Ch. Pr. 175; *Bigelow v. Bush*, 9 Paige Ch. R. 343.

³ *Leonard v. Morris*, 9 Paige Ch. 90.

⁴ *Adams v. Bradley*, 12 Mich. 346; *Morey v. Forsythe*, Walk. 465; *Martin v. McReynolds*, 6 Mich. 70; *R. R. Co. v. Gordon*, 41 Mich. 420.

⁵ *Livingston v. Jones*, Har. Ch. 165.

⁶ *Johnson v. Shepherd*, 35 Mich. 113.

⁷ *Woods v. Love*, 27 Mich. 308.

subsequent purchasers or incumbrancers parties, their rights to redeem are not affected thereby.¹ To a bill to foreclose against the principal mortgagor, the mortgagor of another estate, as a collateral security, is a necessary party.² If parties are unnecessarily compelled to put in an answer they will be entitled to costs.³

A bill to set aside a mortgage made by a corporation is demurrable for want of parties if it impleads the foreclosure purchaser as a defendant, and does not make the corporation a party defendant.⁴

To a foreclosure by an assignee whose assignment is not absolute, the assignor should be a party.⁵

In foreclosure by an assignee of a mortgage the maker of the mortgage and of its accompanying note can not complain because the payee of a note is not made a party.⁶

A purchaser of mortgaged premises at an execution sale is a proper party defendant in a suit for the foreclosure of the mortgage.⁷

Those who after a mortgage note has been made have indorsed it by way of additional security to a subsequent taker may be joined as defendants in a foreclosure.⁸

Persons whose claims are prior and adverse to a mortgage are not proper parties to a foreclosure thereof.⁹

There is no reason for making the holder of a tax title on mortgaged premises a defendant in a suit for the foreclosure of the mortgage, and where complainant fails to show any other on his part, the bill will be dismissed, with costs, as to such a defendant.¹⁰

Deed absolute on its face may be shown to be a mortgage.—The doctrine that a deed absolute on its face may be shown to be a mortgage is old and well established.¹¹

¹ *Dunlap v. Wilson*, 32 Ill. 517; *Gorden v. Hobart*, 2 Sum. 403; *Oli-ver v. Piatt*, 3 How. U. S. 333; *Mul-vey v. Gibbons*, 87 Ill. 367.

² *Stokes v. Clendon*, 3 Swanst. 150, note; S. C. 2 Bro. Ch. Ca. 275, note.

³ *Ins. Co. v. Van Rensselaer*, 4 Paige, 85.

⁴ *Coxe v. Hart*, 53 Mich. 557; see *Cicotte v. Anciaux*, Ib. 223.

⁵ *Cooper v. Smith*, 75 Mich. 247.

⁶ *Michigan State Bank v. Trow-bridge*, 92 Mich. 217.

⁷ *Hayward v. Kinney*, 84 Mich. 591.

⁸ *Michigan State Bank v. Trow-bridge*, 92 Mich. 217.

⁹ *Dickerson v. Uhl*, 71 Mich. 398.

¹⁰ *Hayward v. Kinney*, 84 Mich. 591.

¹¹ *McMillan v. Bissell*, 63 Mich. 63, 69; *Johnson v. Van Velsor*, 43 Mich. 208; *Wilson v. Drumrite*, 21 Mo. 325; *Rogan v. Walker*, 1 Wis. 520; *Dow*

A conveyance, with separate agreement for a reconveyance upon the payment of a fixed sum, is in effect a mortgage, and the character of the transaction may be shown by parol and by circumstances, as well as the declarations of the parties. But to cause a deed absolute on its face to be deemed a mortgage, the evidence must be strong and convincing.¹

An absolute deed with a separate written defeasance, executed the same day, are construed as one instrument, and as a mortgage.² So, where a grantee gives a bond to reconvey, it will be construed as a mortgage; but otherwise if the bond is given to a third party.³ And a deed of one tract given as security for the payment of the purchase price of another is in the nature of a mortgage.⁴

Parol proof to show that a deed absolute on its face was intended as a mortgage is not prevented by the statute of frauds.⁵

Defeasible purchases are narrowly watched, and courts of equity always favor the right of redemption.⁶

A conveyance absolute in form will not be held to be a mortgage from the mere fact of an agreement to reconvey with or without an advance in price.⁷

Though contracts for repurchase, contemporaneous with conveyances absolute in form, are sometimes strong evidence tending to show that the conveyances are intended to be mort-

v. Chamberlain, 5 McLean, 282; *Barber v. Milner*, 43 Mich. 248; *Hughes v. Edward*, 9 Wheat. 489-495; *Wadsworth v. Loranger*, Har. Ch. R. 113; *Swetland v. Swetland*, 3 Mich. 482; *Emerson v. Atwater*, 7 Mich. 22; Washb. on Real Prop. 126; 4 Kent Com. 141; *Strong v. Stewart*, 4 John. Ch. 167; *Van Buren v. Olmstead*, 5 Paige Ch. 9; *Helm v. Boyd*, 124 Ill. 370; *Reilly v. Brown* 87 Mich. 162; *Crawford v. Osnum* 70 Mich. 561; *Jordan v. De Golis*, 91 Mich. 370.

¹ *Miller v. Thomas*, 14 Ill. 428; *Bullock v. Battenhausen*, 108 Ill. 28; *Sharp v. Smitherman*, 85 Ill. 153; *Allen v. Woodruff*, 96 Ill. 11; *Hancock v. Harper*, 86 Ill. 445; *Bartling Brasuhn*, 103 Ill. 441; *Strong v.*

Strong, 126 Ill. 301; *Darst v. Murphy*, 119 Ill. 345; *Bailey v. Bailey*, 115 Ill. 551; *Ethridge v. Wisner*, 86 Mich. 166; *McArthur v. Robinson*, 104 Mich. 540.

² *Snyder v. Griswold*, 37 Ill. 216; *Jackson v. Lynch*, 129 Ill. 72; 1 Washb. on Real Prop. 505; see *Douglas v. Douglas*, 72 Mich. 86.

³ *Carr v. Rising*, 62 Ill. 14; *Seymour v. Mackay*, 126 Ill. 841.

⁴ *Hallesy v. Jackson*, 66 Ill. 129; see *Rue v. Dole*, 107 Ill. 275.

⁵ *Reigard v. McNeil*, 38 Ill. 400; *Wright v. Gay*, 101 Ill. 233; *McMillan v. Bissell*, 63 Mich. 69; see *Workman v. Greening*, 115 Ill. 477.

⁶ *Stahl v. Dehn*, 72 Mich. 645.

⁷ *Stahl v. Dehn*, 72 Mich. 645.

gages, yet where it appears that the parties really intended an absolute sale and a contract permitting repurchase, such intention must control, and, to ascertain the intention, the court will look beyond the writings to the circumstances surrounding the transaction.¹

The character of the transaction is not affected by the fact that the contract gave possession to the grantee until payment.²

The fact that a conveyance of land contained a clause providing that the grantee should reconvey upon receiving a certain sum within a specified time does not prevent the instrument being construed as a deed with an option to repurchase where it appears that repurchase was optional with the grantor and that the conveyance was made to pay a previous indebtedness.³

One who seeks to show that a deed absolute on its face was given as a mere security is required to present evidence sufficient to command unhesitating assent of every reasonable mind.⁴

SECTION IV.

FRAME OF BILL.

It is proper to remark, by way of caution to the pleader, that much diversity exists in the cases with regard to foreclosure suits, since, in most of the States, there are statutes upon the subject and a line of decisions peculiar to the State.

The title in the mortgagor need not be averred in the bill.⁵

It is stated in Chancery Rule 28*a* that in a bill for foreclosure or satisfaction of a mortgage, it shall not be necessary to set out at large the interests of several of the defendants who are purchasers of or who have liens on the equity of redemption in the mortgaged premises, subsequent to the registry or recording of complainant's mortgage, and who claim no right in opposition thereto; but it shall be sufficient for the complainant, after setting out his own right and interest in the premises, to state generally that such defendants have or claims some interest in the premises as subsequent purchasers, or incumbrancers or otherwise.

¹ *Stahl v. Dehn*, 72 Mich. 645.

² *Clark v. Landon*, 90 Mich. 83.

³ *Reed v. Bond*, 96 Mich. 134.

⁴ *Fitheridge v. Wisner*, 86 Mich. 166.

⁵ *Harwood v. Underwood*, 28 Mich. 427; *Ford v. Loomis*, 33 Mich. 121.

This is also the New York rule, where it seems that the bill must allege that no proceedings at law have been had to recover the debt, or if there have been such proceedings it must state the nature of them, and that they have been discontinued, or that the remedy at law has been exhausted;¹ this is a statutory provision.² A similar statute seems to exist in Indiana, where it was held that an omission of such a statement is fatal.³

The language of this statute has been held to refer to suits on the debt, and not to previous foreclosure proceedings.⁴

Unless a bill contains the proper averments no proof can be admitted. It must aver the debt to be due, and that the assignment has been made. Executors of a mortgage must not only describe themselves as such, but they must allege the death of their testator and the probate of will.⁵

In foreclosing a second mortgage the title obtained through foreclosure of a first mortgage can not be assailed without special averment.⁶ Performance of conditions precedent must be averred.⁷ When it is sought to establish equal priorities between two mortgagees, the bill should set out the facts.⁸ Where breach of interest clause is claimed, it is sufficient if the bill avers that the complainant makes his election that the principal shall become due at once. And no notice before commencing suit of the election is essential.⁹ Avoidance of a special defense is pleaded by introducing the defense in the bill in the form of a pretense, and then adding the reply in the form of a charge. But when a bill is not so framed, and a particular defense is set up by the answer, the bill should be amended to meet it.¹⁰

In Illinois, it is held that a judgment on a note secured by mortgage, which remains unsatisfied, is no bar to a proceed-

¹ *Pattison v. Powers*, 4 Paige Ch. 549; *Williamson v. Champlin*, 1 Clarke, 9.

² Barb. Ch. Pr. 178.

³ *McMillen v. Furness*, 1 Smith, 73.

⁴ *Lee v. Clary*, 33 Mich. 223.

⁵ *Peckham v. Buffam*, 11 Mich. 530; *Correll v. Cole*, 16 Mich. 223; *Middlesworth v. Nixon*, 2 Mich. 425; *Livingston v. Jones*, Har. Ch. 165; *Harwood v. Underwood*, 28 Mich. 427; *Ford v. Loomis*, 33 Mich. 121.

⁶ *Wurcherer v. Hewitt*, 10 Mich. 453; *Dawson v. Bank*, 15 Mich. 489.

⁷ *Curtis v. Goodenow*, 24 Mich. 21.

⁸ *Van Aken v. Gleason* 34 Mich. 477.

⁹ *Ives v. Kimball*, 1 Mich. 308; 7 Mich. 69; 18 Mich. 298; 22 Mich. 235; 36 Mich. 81.

¹⁰ *Connarton v. Miller*, 41 Mich. 608.

ing to foreclose, or that a mortgagee may bring ejectment, sue on the note at law, and maintain a bill to foreclose at the same time; that he may pursue the several remedies until his debt is satisfied.¹

The bill need not allege an indebtedness for which it was given; and if alleged, it need not be proved.²

In bills to foreclose, it is not necessary to set out at length the rights and interests of the defendants who are subsequent purchasers, judgment creditors or other incumbrancers. It is sufficient for the complainant, after setting out his own right and interest in the premises, to state generally that such defendants have, or claim to have, some interest in the premises, as subsequent purchasers or incumbrancers or otherwise.³ And it has been held that where the bill unnecessarily sets out the rights of the several defendants at length, it may be excepted to for impertinence.⁴

In a bill in chancery to foreclose a mortgage claimed to have been executed by husband and wife upon land the fee of which was in the latter, the mortgage may be stated according to its legal effect, without stating in detail the various matters which are necessary to a transfer of a married woman's title.⁵

Proceedings at law.—A bill to foreclose a mortgage must state therein whether any proceedings have been had at law for the recovery of the debt secured thereby, or any part thereof; and whether such debt, or any part thereof, has been collected or paid.⁶ A failure to state the amount claimed to be due, and whether any proceedings have been had at law to collect the debt, etc., will render the bill demurrable.⁷

No. 157. Bill of foreclosure.

STATE OF MICHIGAN.

The Circuit Court for the County of ———. In Chancery.

To the Circuit Court for the County of ———. In Chancery.

1. Your orator A B, of the town of — county of — in said State,

¹ *Vansant v. Allmon*, 23 Ill. 30; *Hughes v. Edwards*, 9 Wheat. 489; *Morrison v. Buckner*, Hemp. 442; see also *Morgan v. Sherwood*, 53 Ill. 171.

² *Day v. Perkins*, 2 Sandf. Ch. 359; see also *Collins v. Carlile*, 13 Ill. 254.

³ 2 Barb. Ch. Pr. 177.

⁴ *Ib.*; *Union Ins. Co. v. Van Rensselaer*, 4 Paige Ch. 85.

⁵ *Williams v. Soutter*, 55 Ill. 126; *Goltra v. Green*, 98 Ill. 317; *West v. Krebaum*, 88 Ill. 263.

⁶ How. St. 6705.

⁷ *Bailey v. Gould*, Walk. Ch. 483; *Martin v. McReynolds*, 6 Mich. 74, 75.

respectfully shows unto the court that on or about the — day of — in the year of our Lord, one thousand eight hundred and —, C D, of the town of —, county of — and State of Michigan, did make and execute, under his hand and deliver to your orator a certain note (*or bond as the case may be*), as in and by said note, now in the possession of your orator and ready to be produced and proved as this honorable court shall direct, and to which, when proven, your orator for greater certainty, prays leave to refer, will more fully and at large appear.

2. And your orator further shows unto the court that the said C D, on the — day of —, in the year of our Lord one thousand eight hundred and — in order to secure to your orator the payment of the said sum of money mentioned in said —, together with the interest thereon, in manner aforesaid, did execute under his hand and seal, acknowledge and deliver to your orator a certain indenture of mortgage, bearing date the day and year last aforesaid, and thereby for the consideration of — dollars, lawful money of the United States, to him in hand paid, the receipt whereof was by the said indenture of mortgage duly confessed and acknowledged, the said C D, the party of the first part, in and to said indenture of mortgage, did grant, bargain, sell, release, enfeoff and confirm unto your orator A B, the party of the second part, in the said indenture and to his heirs and assigns *forever*, all the certain pieces or parcels of land situated in the — of —, county of —, and State of Michigan, and described as follows, viz.: (*Here describe premises.*)

3. That said indenture of mortgage was upon the *express condition* that the same should be null and void if the said party of the first part, his heirs, executors, or administrators, should and did well and truly pay, or cause to be paid, to said party of the second part, his heirs, executors, administrators or assigns, the said sum of money and interest, according to the terms and conditions of said note, as in and by said mortgage, now in the possession of your orator, ready to be produced and proved as this court shall direct, reference being had thereto, will more fully appear.

4. That the execution of said mortgage was, on the — day of —, A. D. 18—, duly acknowledged by the said defendant C D, before a notary public duly authorized to take such acknowledgment, the certificate of such acknowledgment being duly indorsed on said mortgage.

5. And your orator further shows unto the court that afterward, to wit: on the — day of —, in the year of our Lord one thousand eight hundred and — the said indenture of mortgage, together with the certificate of acknowledgment thereof, was in due form of law recorded in the office of the register of deeds, in the county of —, in *liber* — of mortgages, on pages —.

And your orator further shows unto the court, that there has been paid upon said note and mortgage the following sums at the dates mentioned, to wit: (*Set forth payments if any.*)

6. And your orator further shows unto the court, that there is now due and unpaid on said note and said indenture of mortgage, the sum of —, and inasmuch as in said mortgage it was expressly agreed that as often as any proceedings be taken to foreclose said mortgage, said party of the first part should pay to your orator — dollars as a reasonable solicitor's fee, over and above all legal costs, your orator claims that by the filing of this

bill the same has now become due and payable to your orator in addition to the sum above mentioned.

7. And your orator further shows that no proceedings at law have been had to recover the debt secured by the said note and mortgage, or any part thereof.

8. And your orator further shows unto the court that he has caused examinations to be made of the record of deeds and mortgages in the office of the register of the county of —, where said mortgaged premises are situated, and from which said several examinations it appears, and your orator expressly charges the fact that E F and G H, of, etc., have or claim to have rights and interests in the premises described in the said indenture of mortgage, or in some part or parts thereof, as subsequent purchasers or incumbrancers or otherwise.

Your orator therefore asks the aid of this court in the premises, and prays :

I. That the above named C D, E F and G H, who are made parties defendant to this bill, may appear and answer this, your orator's bill, without oath (answers on oath being hereby expressly waived), and that they may come to a fair and just account, touching the amount due to your orator upon the said note and indenture of mortgage hereinbefore mentioned and set forth;

II. And that said defendants or some of them may be decreed to pay forthwith to your orator the amount which shall be found to be due to him thereon, and the interest thereon, together with your orator's reasonable costs and charges in this behalf, sustained;

III. And in default thereof, that the defendants herein named, and each of them, and all persons claiming or to claim from or under them, may be foreclosed and barred of and from all equity of redemption and claim of, in and to said mortgaged premises, and every part and parcel thereof, with the appurtenances;

IV. And that all and singular the said mortgaged premises, with the appurtenances, may be sold by the order and decree and under the direction of this court, and the moneys arising from the sale thereof, so far as shall be necessary, or so far as the same shall extend, be applied toward satisfying to your orator the full amount of the moneys so as aforesaid secured, in and by the said note and indenture of mortgage, both principal and interest, if the whole shall be then due and unpaid;

V. Or if the whole amount shall not be then due, that such part of the said mortgaged premises as may be necessary to discharge the principal and interest moneys then found to be due to him thereon and unpaid, together with your orator's reasonable costs and charges, may be sold as aforesaid, and the proceeds to be applied thereto as aforesaid;

VI. Or in case it shall appear to this court that the said mortgaged premises are so situated that the sale of the whole will be most beneficial to the parties concerned, that then the whole of the said mortgaged premises with the appurtenances, may be sold as aforesaid, and the proceeds of such sale be applied, as well to the discharge of the principal and interest moneys then due, and your orator's costs and charges, as toward the whole or residue of the amount secured by the said note and indenture of mortgage, and not due and payable at the time of such sale, or that this court may direct the balance of the proceeds of such sale, after paying the sum

due upon the said note and indenture of mortgage, with your orator's costs and charges, to be put out at interest under the direction of this court, for the benefit of your orator, to be paid to him as the remainder of said principal and interest moneys shall become due and payable, and the surplus, if any, for the benefit of the person or persons who may be entitled thereto;

VII. And that the said defendants and all persons claiming and to claim under them or either of them, or who have come into possession of the said mortgaged premises, or any part or portion thereof during the pendency of this suit, deliver and yield up possession thereof to your orator, or to whomsoever shall become the purchaser or purchasers thereof at the said sale, on his, her, or their producing to him or them, or to the person or persons in possession of said mortgaged premises, or any part thereof, the deed or deeds executed by the commissioner pursuant to such sale as aforesaid, and a certified copy of the order confirming the report of such sale, after such order has become absolute;

VIII. And that the said defendant, C D, pay to your orator any balance that shall remain due to your orator, of the principal and interest of said note and indenture of mortgage, if the sale of such mortgaged premises as aforesaid fail to produce sufficient to pay the whole of said mortgaged debt, and the costs of this suit; and that, in such case, your orator have execution for the collection of such balance and the costs thereon, according to the rules and practice of this court;

IX. And that your orator may have such other relief or such further relief in the premises as shall be agreeable to equity and good conscience.

May it please the court, the premises being considered, to grant to your orator the writ of subpoena to be issued out of and under seal of this court, to be directed to the said C D, E F and G H, defendants herein, and thereby commanding them and each of them, on a certain day and under certain penalty to be therein inserted, personally to be and appear before this court, then and there to answer all and singular the said premises, and to stand to, abide and perform such order and decree therein as this court shall make therein and as shall be agreeable to equity and good conscience. And your orator will ever pray, etc.

A. B.

E F,

Solicitor for complainant, and of counsel.

No. 158. Bill for foreclosure by assignee of mortgage.

(Venue and address, as in No. 157, ante, page 350.)

1. Your orator, A B, of, etc., respectfully represents that on, etc., C D, of, etc., being indebted to one E F, of, etc., in the sum of — dollars, made and delivered to the said E F his certain promissory note of that date, and thereby promised to pay to the order of the said E F, — after date, the said sum of — dollars, with interest at the rate of — per cent per annum; as will more fully appear by the said note, ready to be produced in court, and by the copy of the same herewith filed, marked "Exhibit A," and made part of this your orator's bill of complaint.

2. And the said C D, to secure the payment of the principal and interest, mentioned in the said promissory note, did, at the same time, by his mortgage deed of that date, convey to the said E F, in fee simple, that cer-

tain parcel of land, with the appurtenances, in the said county of —, described as follows, to wit: (*here set out the description of the mortgaged property;*) subject, however, to a condition of defeasance upon the payment of the principal sum and interest aforesaid, according to the tenor and effect of the said promissory note; which said mortgage deed was, on, etc., duly acknowledged and afterwards, on, etc., filed for record in the recorder's office of said county, as by the said mortgage deed and its accompanying certificates of acknowledgement, and recording, ready to be produced in court, and by the copy of the same herewith filed, marked "Exhibit B," and made a part of this bill, will more fully appear.

3. And your orator further represents unto your honor, that the said promissory note and mortgage deed have been duly assigned and transferred to your orator for a valuable consideration, and are now held and owned by your orator.

4. And your orator further represents unto your honor, that the said principal sum of — dollars, with interest thereon from, etc., remains due and unpaid to your orator, although the same long since became due; by means whereof the said mortgaged property has become forfeited, subject nevertheless, to redemption in equity by the said C D, his heirs or assigns.

5. Your orator further represents that no proceedings at law have been had to recover the said debt secured by the said note and mortgage, or any part thereof; and no part of said debt has been collected or paid.

6. And your orator is informed and believes, and so states, that G H and J K, of, etc., have, or claim, some interest in the said mortgaged premises, or in some part thereof, as purchasers, mortgagees, judgment creditors, or otherwise, which interests, if any there be, have accrued subsequent to the lien of said mortgage deed, and are subject thereto.

Your orator therefore asks the aid of this honorable court in the premises; and makes the said C D, G H and J K parties defendant to this bill, and prays:

I. That they may be required to answer this, your orator's bill, according to the rules and practice of this honorable court, *but not under oath, their answer under oath being hereby waived;*

II. That an account may be taken in this behalf by or under the direction of the court;

III. That the said defendant, C D, may be decreed to pay your orator whatever sum shall appear to be due him upon the taking of such account, together with his costs of this proceeding, by a short day to be fixed by the court:

IV. That, in default of such payment, the said mortgaged property may be sold, as may be directed by the court, to satisfy the amount due and costs;

V. That in case of such sale, and a failure to redeem therefrom, pursuant to the statute, the defendants, and all persons claiming through or under them, subsequent to the commencement of this suit, may be forever barred and foreclosed of all right and equity of redemption in the said premises;

VI. That your orator may have such other and further relief in the premises as equity may require and to your honor may seem meet.

(*Pray process, as in No. 157, ante, page 353.*)

No. 159. Bill for foreclosure against executor and heirs, etc., of mortgagor, deceased.

(Venue and address as in No. 157, page 350.)

1. Your orator, A. B. of, etc., respectfully represents, that on, etc., one E F, late of, etc., being indebted to your orator in the sum of — dollars, made and delivered to your orator his two certain promissory notes of that date, one of the same being for the sum of — dollars, and payable to your orator — after date, and the other for the sum of — dollars, payable — after date, both of said notes to draw — interest per annum from their date, as will more fully appear by the said notes, ready to be produced in court, and by the copies of the same herewith filed, marked "Exhibit A," and made part of this your orator's bill of complaint.

2. Your orator further represents unto your honor, that to secure the payment of the principal sums and interest above mentioned, the said E F, and F F, his wife, on the same day, by their mortgage deed of that date, conveyed to your orator, in fee simple, that certain parcel of land, with its appurtenances, in the said county of —, known and described as follows, to wit: (*here set out the description*) subject, however, to a condition of defeasance upon the payment of the principal sums and interest aforesaid, according to the tenor and effect of the said promissory notes: which said mortgage deed was, on, etc., duly acknowledged, and afterwards, on, etc., filed for record in the office of the recorder of the said county of —, as by the said mortgage deed and its accompanying certificates, ready to be produced in court, a copy of which, marked "Exhibit B," is hereto attached, and made a part of this bill, will more fully appear. (*)

3. Your orator further represents that afterwards, to wit, on, etc., the said E F departed this life, leaving the said F F, his widow, and G F, H F and J F, his children, who are minors and his only heirs at law, him surviving; that the said E F, in his lifetime, duly made and published his last will and testament in writing, bearing date, etc., by which one L M was appointed to be the executor of said will; that upon, or soon after, the death of the said E F, the said L M duly proved the said will in the — court of the county of, etc., and undertook the executorship thereof. (**)

4. Your orator further represents unto your honor, that the said principal sums of money, with interest from the — day of, etc., remain due and unpaid to your orator, although the same long since became due, according to the tenor and effect of the said promissory notes; by means whereof the said mortgaged property has become forfeited, subject, nevertheless, to an equity of redemption by the said legal representatives of the said E F, deceased, or his heirs or assigns.

5. Your orator further represents that no proceedings at law have been had to recover the said debt secured by the said notes and mortgage, or any part thereof; and no part of said debt has been collected or paid.

6. Your orator further represents, upon information and belief, that O P and R S, of, etc., have or claim some interests in the mortgaged property aforesaid, as purchasers, mortgagees, trustees, judgment creditors, or otherwise, the precise nature of which is unknown to your orator, but such interests, if any there be, have accrued since, and are subject to the lien of your orator, by virtue of said mortgage deed.

Your orator therefore asks the aid of this honorable court in the premises, and prays :

I. That the said F F, G F, H F, J F, and L M, *executor of the last will and testament* of the said E F, deceased, and the said O P and R S, who are made parties defendant to this bill, may be required to answer this your orator's bill, according to the rules and practice of this honorable court, *but not under oath, the answer under oath being hereby waived;*

II. That a guardian *ad litem* may be appointed for said minor heirs;

III. That an account may be taken in this behalf by or under the direction of the court;

IV. That the said defendant may be decreed to pay your orator whatever sum shall appear to be due him upon the taking of such account, together with his costs of this proceeding, by a short day to be fixed by the court;

V. That in default of such payment the said mortgaged property may be sold, as may be directed by the court, to satisfy the amount due and costs;

VI. That in case of such sale and a failure to redeem therefrom, pursuant to the statute, the defendants, and all persons claiming through or under them, subsequent to the commencement of this suit, may be forever barred and foreclosed of all right and equity of redemption in the said premises;

VII. That your orator may have such other and further relief in the premises as equity may require, and to your honor may seem meet.

(*Pray process as in No. 157, ante, page 353.*)

No. 160. *Bill to foreclose against administrator, heirs, etc., of mortgagor.*

(*Venue and address as in No. 157, ante, page 350.*)

(*Proceed as in No. 159, ante. to the asterisk (*) and then as follows:*)

Your orator further represents that afterward, on, etc., the said E F departed this life, intestate, leaving the said F F, his widow, and G F, H F and J F, his minor children and only heirs at law, him surviving; that soon after the death of the said E F, one R M of, etc., was, by the — court of the said county of —, duly appointed administrator of the estate of the said E F, deceased, who has since that time performed the duties pertaining to such administration. (*Then proceed as in the same form, No 159, from the double asterisk (**) to the end. Describing the said R M as "administrator of the said E F, deceased," instead of, as executor, etc.*)

No. 161. *Bill to foreclose deed of trust given to secure a note.*

(*Venue and address, as in No. 157, ante, page 350.*)

1. Your orator, A B, of, etc., respectfully represents that on, etc., one C D, late of, etc., being indebted to your orator in the sum of — dollars, made and delivered to your orator his certain promissory note of that date, and thereby promised to pay your orator the said sum of money in — years after the date thereof, with interest thereon at the rate of — per cent per annum, payable —, as will appear by the said note, ready to be produced in court, and by the copy of the same hereto attached, marked "Exhibit A," and made a part of this, your orator's bill of complaint.

2. Your orator further represents that to secure the payment of the

principal sum and interest above mentioned, the said C D and D D, his wife, on, etc., by their deed of trust of that date, conveyed to one E F in fee simple, the following described real property, with the appurtenances thereto belonging, to wit (*here describe the premises*): in trust, nevertheless, for the purpose of securing the principal sum and interest now due your orator as aforesaid, and subject to a condition of defeasance upon the payment of the said principal sum and interest, according to the tenor and effect of the said note; which said deed of trust was, on, etc., duly acknowledged, and afterwards, on, etc., filed for record in the recorder's office of the county of — aforesaid; as by the said deed of trust and its accompanying certificates of acknowledgment and recording, ready to be produced in court, will more fully appear; a copy of the same is hereto attached, marked "Exhibit B," and is hereby made a part of this bill of complaint.

3. Your orator further represents that on, etc., the said C D departed this life, intestate, leaving the said D D, his widow, and E D and F D, his children and only heirs at law; that afterwards, on, etc., one G H, of, etc., was by the — court of the county of — aforesaid, duly appointed administrator of the estate of the said C D, deceased; and that the said G H entered upon and assumed the duties of such administration.

4. Your orator further represents that the said C D was, at the time of his decease, the owner of the equity of redemption of the said described premises.

5. Your orator further represents that no proceedings at law have been had to recover the said debt secured by the said note and deed of trust, or any part thereof; and no part of said debt has been collected or paid.

6. Your orator further represents that the said C D did not, in his lifetime, nor has any person since his death, paid the said principal sum of — dollars, or such interest thereon, nor any part of the same, although the same has long since become due; by means whereof the said premises so conveyed have become forfeited, subject, nevertheless, to redemption in equity by the representatives and heirs of the said C D, deceased.

7. Your orator further represents that by reason of the statute in such case made and provided, the said E F, as such trustee in the said trust deed named, is divested of his authority to make sale of the said premises in the manner provided therein.

Forasmuch, therefore, as your orator is without remedy in the premises, except in a court of equity, your orator prays:

I. That the said D D, E D, F D, E F, and G H, administrator of the estate of the said C D, deceased, who are made parties defendant to this bill, may be required to make full and direct answer to the same, *but not under oath, the answer under oath being hereby waived*;

II. That an account may be taken in this behalf, by or under the direction of this honorable court;

III. That the defendants, or some of them, may be decreed to pay to your orator whatever sum shall appear to be due to him upon the taking of the said account, together with his costs of this proceeding, by a short day to be fixed by the court;

IV. That in default of such payment the said premises may be sold, as the court shall direct, to satisfy the amount due your orator and the costs;

V. That in case of such sale, and of a failure to redeem therefrom pursuant to law, the defendants, and all persons claiming through or under them, after the commencement of this proceeding, may be forever barred and foreclosed of all right or equity of redemption of the said mortgaged property;

VI. That your orator may have such other and further relief in the premises as equity may require and to your honor shall seem meet.

May it please, etc. (*Pray process as No. 157, ante, page 353.*)

No. 162. Bill to foreclose a deed absolute on its face, intended as a mortgage.

(*Venue and address as in No. 157, ante, page 350.*)

1. Your orator, A B. of, etc., respectfully represents that on, etc., one D C. of, etc., being indebted to your orator in the sum of — dollars, as evidence of such indebtedness, on that day executed and delivered his certain promissory note for that amount to your orator, and thereby promised to pay to your orator —, after date, the sum of — dollars, with interest at the rate of — per cent per annum, as will more fully appear by the said promissory note, ready to be produced in court; and by a copy of the same herewith filed and marked "Exhibit A," and made a part of this bill of complaint.

2. Your orator further represents that to secure the payment of the said principal sum and interest, the said C D. and B D, his wife, by an absolute deed of conveyance, of that date, conveyed to your orator in fee simple, the following described real property, to wit: (*here insert description*), which said deed was on, etc., duly filed for record in the recorder's office of —, of the said county of —, as by the said deed will, when produced, appear, a copy of which, with the accompanying certificates of acknowledgment and recording, are hereto attached and marked "Exhibit B," and are made a part of this bill of complaint.

3. Your orator further represents that the said deed of conveyance, although appearing to be absolute on its face, was not intended to be such by your orator and the said C D; but, on the contrary thereof, it was expressly agreed and understood by and between them, that the said deed and the said premises thereby conveyed, were to be held by your orator simply as a security for the payment of the said sum of money and interest as aforesaid, according to the terms of the said promissory note, and that upon the payment of that sum and interest to your orator, your orator would reconvey the said premises to the said C D by an absolute deed.

4. Your orator further represents that the said C D, from the date of said deed, has continued in the possession of said premises, and the receipts of the rents and profits thereof, and still retains the same.

5. Your orator further represents that the said C D has not yet paid the said principal sum of — dollars, or the interest thereon, or any part thereof, although the same has long since become due; by means whereof the said premises so conveyed have become forfeited to your orator, subject nevertheless to redemption in equity by the said C D, his heirs and assigns.

6. Your orator further represents that no proceedings at law have been had to recover the said debt secured by said note and deed, or any part thereof; and no part of said debt has been collected or paid.

7. Your orator further represents, upon information and belief, that E F and G H, of, etc., have or claim some interest (*the precise nature whereof is unknown to your orator*), in the premises so conveyed as aforesaid, as purchasers, mortgagees, judgment creditors or otherwise, but such interests, if any there be, have accrued since and are subject to the lien of your orator by virtue of the said deed of conveyance.

Forasmuch, therefore, as your orator is without remedy in the premises, except in a court of equity, your orator prays :

I. That the said C D, D D, E F and G H, who are made parties defendant to this bill, may be required to make full and direct answer to the same, *but not under oath, the answer under oath being hereby waived*;

II. That an account may be taken in this behalf by or under the direction of the court;

III. That the said defendant C D may be decreed to pay to your orator whatever sum shall appear to be due to him upon the taking of such account, together with the costs of this proceeding by a short day, to be fixed by the court;

IV. That in default of such payment the said premises may be sold as the court may direct, to satisfy said debt and costs;

V. That in case of such sale and a failure to redeem therefrom pursuant to the statute, the defendants and all persons claiming through or under them after the commencement of this suit, may be forever barred and foreclosed of all right or equity of redemption of the said property;

VI. That your orator may have such other and further relief in the premises as equity may require and to your honors shall seem meet.

(*Pray process as in No. 157, ante, page 353.*)

SECTION V.

PRACTICE ON FORECLOSURE BILLS.

Lis pendens.—The statute provides, that “to render the filing of a bill constructive notice to a purchaser of real estate, it shall be the duty of the complainant to file for record, with the register of deeds of the county in which the lands to be affected by such constructive notice are situated, a notice of the pendency of such suit in chancery, setting forth the title of the cause, and the general object thereof, together with a description of the lands to be affected thereby.”¹ The register of deeds records the notice in a book kept in his office for that purpose, and an authenticated copy of the record of such notice is evidence in the courts of the notice and the filing of

¹How. St. § 6619; *Alterauge v. Christian*, 48 Mich. 60.

the same.¹ Of course if one has actual notice of the pendency of the suit the notice by *lis pendens* is not necessary.²

No. 163. Notice *lis pendens* in foreclosure.

A B,	}
Complainant,	
vs.	
C D,	
Defendant.	

The Circuit Court for the County of ——. In Chancery.

Notice is hereby given, that a suit has been commenced and is pending in said court, upon a bill of complaint filed by the above named complainant against the above named defendant for the foreclosure of a mortgage, bearing date the — day of — one thousand eight hundred and —, executed by —, and recorded in the register's office of the county of —, on the — day of —, one thousand eight hundred and —, at — o'clock in the — noon, in *liber* — of mortgages, on page —, and that the mortgaged premises affected by the said foreclosure were at the time of commencement of this suit, and at the time of filing this notice, situated in the — of —, in the last mentioned county, and are described in the said mortgage as follows, to wit: (*Here describe property*).

E F,
Solicitor for complainant.

Reference to compute amount due.—If a bill to foreclose a mortgage is taken as confessed, or the right of the complainant, as stated in his bill, is admitted by the answer, the complainant may have an order of course referring the cause to a commissioner, to compute the amount due to the complainant, and to such of the defendants as are prior incumbrancers of the mortgaged premises,³ and if the defendant is an infant and has put in a general answer by his guardian, or any of the defendants are absentees, the complainant may have a similar order of course, referring it to a commissioner to take proof of the facts and circumstances stated in the complainant's bill, and to compute the amount due on the mortgage preparatory to the hearing of the cause. But every such cause shall be regularly brought to hearing at the term after the coming in of the commissioner's report before a final decree is entered therein.⁴

¹ *Ibid.* § 6620; *Sinclair v. Slawson*, 44 Mich. 123.

² *Baker v. Pierson*, 5 Mich. 456.

³ Chan. Rule 28b.

⁴ Chan. Rule 28c; *Thayer v. Lane*, Walk. Ch. 200; *Chandler v. McKinney*, 6 Mich. 217; *Smith v. Smith*, 13 Mich. 261.

No. 164. *Order pro confesso, and reference, payments all due.*

STATE OF MICHIGAN.

The Circuit Court for the County of ———. In Chancery.

A B,	}	——— Judicial Circuit in Chancery.
Complainant,		Suit pending in the Circuit Court for the County of
<i>vs.</i>		———. In Chancery, at ——— on the ——— day of ———,
C D,	}	A. D. 18—.
Defendant.		

In this cause, on filing due proof by affidavit that subpoena has been duly and personally served on the defendant, C D, and more than fifteen days having elapsed since the service of the subpoena, upon him as aforesaid, and no appearance by or on behalf of said defendant, C D, having been entered, on motion of D B, solicitor of said complainant, it is ordered that the appearance of the said defendant, C D, be, and the same is hereby entered by the register of said court, in accordance with the rules and practice thereof: and on further motion of said solicitor, it is ordered that the bill of complaint filed in said cause be, and the same is hereby taken as confessed by said defendant, C D, and that said bill be referred to J M D, circuit court commissioner of ——— county, to compute and ascertain the amount due to the complainant for principal and interest on the note and mortgage mentioned and set forth in said bill, and report the same to this court with all convenient speed; and further, that said commissioner take proofs of the material facts and circumstances charged in said bill, and return the same with this report.

D B,

Complainant's Solicitor.

Entered by ———,
Register.

A reference to a circuit court commissioner, to compute the amount due upon a mortgage, is for the convenience of the circuit judge, and he can dispense with it if he sees fit, and compute the amount himself.¹

Affidavit of regularity.—If the bill of complaint has been taken as confessed, the complainant shall show to the court, at the hearing, by affidavit, that the proceedings to take the bill as confessed have been regular, according to the rules and practice of the court. He shall also show whether the bill has been taken as confessed against all the defendants upon service of subpoena, or after an appearance, or whether some of them have been proceeded against as absentees.² Affidavits of regularity are for the convenience of the court.³

¹ *Ireland v. Woolman*, 15 Mich. 253; *Kellogg v. Putnam*, 11 Mich. 345; *Vaughn v. Nims*, 35 Mich. 297.

² Chancery Rule 28d; see form 17, *ante*, page 57.

³ *Ireland v. Woolman*, 15 Mich. 253.

Proceedings before commissioners.—When a foreclosure suit is contested, no order of reference, in the first instance, is made, as we have already seen.

The parties in such a case produce their witnesses, and the commissioner takes the proofs and reports the same to the court. The judge can then compute the amount due himself, or he may refer the matter to a commissioner to report.¹ If the bill is taken as confessed, against adult defendants, the facts stated in the bill are admitted, and no proof need usually be presented to the commissioner. It is then a mere matter of computation as to the amount due. There is an exception to this rule. There can be no decree upon default when the defendant has been brought in by publication, and has not appeared in the case without proofs; and the complainant in such a case, should be sworn as to the payments.² The commissioner reports to the court the proofs and examinations had before him. On the coming in of his report, the court makes such order as should be just.³ If the commissioner reports nothing due upon the mortgages, and his report is not excepted to, it is conclusive.⁴

His report binds all the parties to the suit if not excepted to.⁵

If the commissioner wrongfully refuses to hear testimony, the remedy is by motion to the court. This should be made at once and without awaiting his report.⁶ This is also the remedy when he errs in not requiring parties to produce books and papers.⁷ And if the proceedings before him are irregular, it is ground to move to set aside his report; and in such a case, further time should be obtained to except to his report.⁸ A circuit court commissioner who has not been designated as injunction master, may execute orders of reference in foreclosure cases.⁹

Hearing.—If the bill has been taken as confessed, or if the case as stated by the complainant is admitted, the cause must be regularly brought to a hearing at a term after the coming

¹ *Ante*, page 360.

² *Brown v. Thompson*, 29 Mich. 72.

³ How. St. § 6677.

⁴ *Thorn v. Halliker*, 12 Mich. 215.

⁵ *Eaton v. Truesdail*, 40 Mich. 1.

⁶ *Schwarz v. Sears*, Walk. Ch. 19;

Ward v. Jewett, *Ibid.* 45.

⁷ *Emerson v. Atwater*, 12 Mich. 314.

⁸ *Suydam v. Duquindre*, Walk. Ch. 23.

⁹ *People v. Randall*, 37 Mich. 473.

in of the commissioner's report before a final decree is entered therein.¹ We have already considered the method of placing causes upon the calendar, and of their relative positions thereon.² When the defendants in a foreclosure suit neglect to appear after due service, the complainant may proceed *ex parte*, without noticing the case for hearing or placing it on the term calendar.³

SECTION VI.

DEFENSES TO.

A mortgagor is not permitted to deny his own title,⁴ and a mortgage will be construed most favorably for the mortgagee.⁵ It is also true that where one has bought land subject to a mortgage, and contracted with the mortgagee for forbearance he can not dispute the existence or validity of the mortgage.⁶ If the defendant claims that the mortgage was procured by false representations, or that it is fraudulent, the burden of proof is upon him.⁷ So it is if the defense is based upon an alleged agreement between the defendant and complainant's assignor. In such a case the agreement must be clearly averred and proven.⁸

Where a mortgage is given upon one tract of land to secure purchase money of another tract, which the mortgagee covenants to convey with warranty, but to which he has no title, such failure of title in the vendor is a good defense in equity in a proceeding to foreclose the mortgage.⁹ An assignee of a note secured by mortgage takes it subject to prior equities between the original parties.¹⁰ And proof that the note which is the basis of the foreclosure suit belongs, not to the complainant, but to those who use his name, will have no further effect upon the suit than to entitle the defendants to the benefit of any defense that they might have had against the real owners.¹¹

¹ Chancery Rule 28.

² *Ante*, page 171.

³ *Warner v. Juif*, 38 Mich. 662.

⁴ *Racine R. R. Co. v. Trust Co.*, 49 Ill. 331.

⁵ *Stuart v. Wilson*, 42 Mich. 154.

⁶ *Smith v. Graham*, 34 Mich. 302.

⁷ *Perrett v. Yarsdorfer*, 37 Mich.

596; *Sloan v. Holcomb*, 29 Mich. 153.

⁸ *Suhr v. Ellsworth*, 29 Mich. 57.

⁹ *Smith v. Newton*, 38 Ill. 230; see also *Weaver v. Wilson*, 48 Ill. 125.

¹⁰ *Lock v. Fulford*, 52 Ill. 166; *Hubbard v. Turner*, 8 McLean, 519.

¹¹ *Spear v. Hadden*, 31 Mich. 265.

It is said that a mortgagee, with notice of subsequent liens, has no right to release his mortgage to the prejudice of such liens.¹ Upon this principle it has been held that if the mortgagee, for a consideration, releases that portion of the land which was primarily liable for the debt, he thereby discharges the other portion.² So, if two estates are mortgaged in one deed, and transferred to different persons, and one released by the mortgagee, the owner of the other, on redeeming, can not compel contribution, but may claim a deduction from the debt in proportion to the value of the parcel released.³

A mortgage of a homestead, given by a married man without his wife's signature, is absolutely void. This is so, even though the wife is not living with her husband.⁴ Where a defendant obtains delay by promising to pay the amount of the decree both parties supposing the title to the mortgaged land to be good, he can not, on finding it to be defective, defend on that ground.⁵ It is no defense to a purchase price mortgage, that there is an outstanding tax title in a third person who has made no claim under it.⁶ An assignment of a mortgage to the grantee of the premises, who assumed the mortgage, extinguishes the debt.⁷ A mortgage providing no time for payment is due as soon as given.⁸

We have not the space to enter into a more full examination of defenses to a foreclosure. Works specially treating of the subject of mortgages will have to be consulted.⁹

Defense in equity as against assignee.—On the foreclosure of a mortgage by an assignee of the notes secured, the maker will have the same right of defense as if the suit was by the payee and mortgagee;¹⁰ although the assignee may be an inno-

¹ *McLean v. Lafayette, etc.*, 3 McLean, 587; see also *Hall v. Edwards*, 43 Mich. 473.

² *Paxton v. Harrier*, 11 Penn. 312; see *Holman v. Bank, etc.*, 12 Ala. 369; *Hauche v. Snyderaker*, 86 Ill. 197.

³ *Parkman v. Welch*, 19 Pick. 238; see also *Iglehart v. Crane*, 42 Ill. 261; *Lock v. Fulford*, 52 Ill. 166; see further defenses of this nature, 1 Hilliard on Mortgages, 327 *et seq.*

⁴ *Sherrid v. Southwick*, 43 Mich. 515; see also *Johnson v. Van Velsor*, 43 Mich. 208.

⁵ *Tenney v. Hand*, 32 Mich. 63.

⁶ *Smith v. Fiting*, 37 Mich. 148.

⁷ *Winans v. Wilkie*, 41 Mich. 264.

⁸ *Eaton v. Truesdail*, 40 Mich. 1.

⁹ See Hilliard on Mortgages; Fisher on Mortgages, etc.

¹⁰ *Barry v. Guild*, 126 Ill. 439; *Olds v. Cummings*, 31 Ill. 188; *Smith v. Newton*, 33 Ill. 230; *Weaver v. Wilson*, 48 Ill. 125; *Towner v. McClelland*, 110 Ill. 542; *Shippen v. Whittier*, 117 Ill. 282.

cent holder for value, and the assignment made before maturity, as against the mortgagor.¹

Limitations and laches.—Prior to 1879 there was no statute of limitations in force in Michigan applicable to mortgages upon real estate, and no conclusive presumption, after a certain period had elapsed, existed by express legislative enactment. But courts of equity, following the analogies of the law, have refused relief in cases where it would have been barred at law by lapse of time. The bar is not, however, a legal, but an equitable one; and the presumption of payment may be rebutted by circumstances.²

The statute now provides that no suit or proceeding shall be maintained to foreclose a mortgage on real estate, either at law or in equity, unless commenced within fifteen years from and after such mortgage shall become due and payable, or within fifteen years after the last payment was made on said mortgage.³

The defense that foreclosure is barred by statute may be raised by answer as well as by demurrer.⁴

SECTION VII.

DECREE AND SALE.

We have already considered the general requisites of a decree in equity, and need now only mention a few points having special reference to a decree of foreclosure.

The 92d rule for practice in the courts of equity of the United States, adopted at the December term, 1863, provides, "that in suits in equity for the foreclosure of mortgages in the Circuit Courts of the United States, or in any court of the Territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and

¹ *Stevens v. Hurlburt*, 25 Ill. App. Ct. R. 126; *Bryant v. Vix*, 83 Ill. 11. *Walker v. Dement*, 42 Ill. 272; *McIntire v. Yates*, 104 Ill. 491; see *Cooper v. Smith*, 75 Mich. 247; *Kent v. Mellus*, 69 Mich. 71.

² *Baent v. Kennicutt*, 57 Mich.

271; *Abbott v. Godfreys*, 1 Mich. 179; *Ins. Co. v. Brown*, 11 Mich. 272; *Curtis v. Goodenow*, 24 Mich. 18; *McKinney v. Miller*, 19 Mich. 112; *Baldwin v. Cullen*, 51 Mich. 33.

³ How. St. § 8709.

⁴ *Highstone v. Franks*, 93 Mich. 52.

execution may issue for the collection of the same; as is provided in the 8th rule of this court regulating the equity practice, where the decree is solely for the payment of money."

Under Rule 92, above referred to, the power of the Circuit Court of the United States, in a foreclosure suit, to order a general execution for any balance remaining due, after sale of the mortgaged premises, is a discretionary one.¹

The common practice in courts of chancery, upon a foreclosure of mortgages, is to decree a surrender of the possession and title papers by the mortgagor and those claiming under him.² It is held in Michigan that no decree should be rendered without the production in court of the notes and mortgage, as evidence of the complainant's right. Or, in place thereof, there must be adequate reasons given why they can not be produced, and clear proof of their continued efficacy.³

An attorney fee provided for in a mortgage will not be allowed in a decree of foreclosure in chancery.⁴ The decree, when granted, may be for the whole amount then due.⁵ But upon a bill to foreclose a mortgage payable in installments, filed at a time when only one installment had become due, and which seeks a foreclosure for that payment only, a decree for an additional installment, not due when the bill was filed, is unwarranted.⁶ In making the decree, the court should always for itself pass upon the evidence.⁷ The decree is a final adjudication of the matters in issue.⁸ As in all other equity cases, the decree should follow the case pleaded and the allegations of the bill.⁹ When the bill is taken as confessed, the defendants admit no more than the case made by the bill.¹⁰

When premises have been mortgaged, and subsequently parcels of, or undivided interests in the same lands have been

¹ *Phelps v. Loyhed*, 1 Dillon, 512.

² *Lawrence v. Lane*, 4 Gilm. 354.

³ *Young v. McKee*, 13 Mich. 552;
Hungerford v. Smith, 34 Mich. 300;
Mickle v. Maxfield, 42 Mich. 304.

⁴ *Van Minter v. McMillen*, 39 Mich. 304; see also *Myer v. Hart*, 40 Mich. 517; *Canfield v. Conkling*, 41 Mich. 371; *Parks v. Allen*, 42 Mich. 482; *Kittermaster v. Brossard*, 105 Mich. 219.

⁵ *Vaughn v. Nims*, 36 Mich. 297;

Johnson v. Van Velsor, 43 Mich. 208.

⁶ *Smith v. Osborn*, 33 Mich. 410; see also *Perkins v. Perkins*, 16 Mich. 162; *McCurdy v. Clark*, 27 Mich. 445.

⁷ *Vaughn v. Nims*, 36 Mich. 297.

⁸ *Hazen v. Reed*, 30 Mich. 331.

⁹ *Livingston v. Hayes*, 43 Mich. 129.

¹⁰ *McCabe v. Farnsworth*, 27 Mich. 52.

conveyed or encumbered, on a foreclosure of such mortgage the decree should provide that the premises be sold in the inverse order of such conveyances or incumbrances.¹

The court has power to decree and compel the delivery of the possession of the premises to the purchaser at the commissioner's sale.²

Personal decree.— If any balance of the mortgage debt remains unsatisfied after the decree, and in case such balance is recoverable at law, the statute authorizes a personal decree in favor of the complainant.³ So, too, a personal decree may be rendered against third persons who have secured the payment of the mortgage debt.⁴ But a personal decree is not proper against a person brought in by publication, who has not appeared, and has not been served with process.⁵ Neither can it be allowed against a wife who joined with her husband in the execution of the mortgage;⁶ nor, in the first instance, against guarantors of the collection of the mortgage debt.⁷

A defendant who has appeared should have notice of the entry of the decree and an opportunity to be heard on the settlement of the same.⁸ A reasonable time is allowed for the payment of the money fixed by the decree, before the commencement of the advertisement of sale.⁹

It is provided by section 6706 of How. Stat. that if it shall appear that any judgment has been obtained in a suit at law for the money demanded by the bill, or any part thereof, no proceedings shall be had in such case, unless to an execution

¹ *Briggs v. Kaufman*, 2 Mich. N. P. 160; see *Sibley v. Baker*, 23 Mich. 312; *Mason v. Payne*, Walk. Ch. 459; *Cooper v. Bigley*, 13 Mich. 463; *Ireland v. Woolman*, 15 Mich. 253; *Gantz v. Toles*, 40 Mich. 725; *Gilbert v. Haire*, 43 Mich. 283; *Sager v. Turper*, 35 Mich. 134; *McKinney v. Miller*, 19 Mich. 143; *Davis v. Ryder*, 5 Mich. 423; *Bailey v. Gould*, Walk. Ch. 478; *McCullum v. Turpie*, 32 Ind. 146; see *Lock v. Fulford*, 52 Ill. 156; *Payne v. Avery*, 21 Mich. 524; *contra*, see *Barney v. Myers*, 28 Iowa, 472; *Niles v. Harmon*, 80 Ill. 396; *Hawhe v. Snyderaker*, 86 Ill. 197; *M. Co. v. Daggett*, 84 Ill. 556.

² How. St. § 6702.

³ How. St. § 6702; see *Crawford v. Edwards*, 33 Mich. 355; *Miller v. Thompson*, 34 Mich. 12; *Higman v. Stewart*, 38 Mich. 533; *Hicks v. McGarry*, 38 Mich. 637; *Booth v. Ins. Co.*, 43 Mich. 299; *Tomlinson v. Gates*, 98 Mich. 49.

⁴ *Innes v. Stewart*, 38 Mich. 285.

⁵ *Kitchell v. Mudgett*, 37 Mich. 81.

⁶ *Howe v. Lemon*, 37 Mich. 164.

⁷ *Johnson v. Shepherd*, 35 Mich. 115.

⁸ *Detroit Marine Ins. Co. v. Renz*, 33 Mich. 298.

⁹ *Det. Bank v. Truesdail*, 38 Mich. 430.

against the property of the defendant in such judgment the sheriff or other proper officer shall have returned that the execution is unsatisfied in whole or in part, and that the defendant has no property whereof to satisfy such execution except such mortgaged premises.

The prohibition in this section extends not only to cases where judgment has been rendered upon the bond or note accompanying the mortgage, but also to cases where judgment has been obtained for the debt or money, which the bond or note and mortgage were given to secure.¹

No. 165. Decree of foreclosure and sale, pro confesso.

STATE OF MICHIGAN.

The Circuit Court for the County of ——. In Chancery.

A B, Complainant. vs. C D, Defendant.	}	At a session of said court held at the — of — on the — day of — one thousand eight hundred and —.
--	---	--

Present, HON. A J M, *Circuit Judge*.

This cause came on to be heard, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.:

On reading and filing the report of S O, one of the commissioners of this court, which report bears date the — day of — in the year one thousand eight hundred and —, and was made in pursuance of an order of this court heretofore made in this cause, referring it to one of the commissioners of this court to compute the amount due to the complainant on the note and mortgage mentioned and set forth in the bill of complaint, from which it appears that there was due to the said complainant at the date of said report, for said principal and interest the sum of (*here state amount*) and on reading and filing the affidavit of D B, solicitor for complainant, showing the regularity of the proceedings in this cause, to take said bill of complaint as confessed; and on motion of D B, solicitor and counsel for the complainant, it is ordered, adjudged and decreed, and this court, by virtue of the authority therein vested, doth order, adjudge and decree, that the said report, and all things therein contained, do stand ratified and confirmed. And it is further ordered, adjudged and decreed, that the said defendant pay or cause to be paid to said complainant or to D B, his solicitor, the amount so reported due as aforesaid, together with the interest and costs, on or before the — day of — in the year one thousand eight hundred and —, and in default thereof, that all and singular the said mortgaged premises mentioned in the bill of complaint in this cause, and hereinafter described, or so much thereof as may be sufficient to raise the amount due to the complainant, for the principal, interest

¹ *Dennis v. Hemingway*, Walk. Ch. Mich. 534; *Maynard v. Pereault*, 30 387; see also *Cooper v. Bresler*, 9 Mich. 160.

and costs in this case, and which may be sold separately without material injury to the parties interested, be sold at public auction, by or under the direction of S O, commissioner of this court, at any time after the said — day of —, in the year one thousand eight hundred and —; that the said sale be made in the county where the said mortgaged premises, or the greater part thereof, are situated; that the said commissioner give public notice of the time and place of such sale, according to the course and practice of this court, and that the complainant, or any of the parties in this cause, may become the purchaser; that the said commissioner execute a deed to the purchaser or purchasers of the mortgaged premises on the said sale; and that the said commissioner out of the proceeds of said sale, pay to the complainant or his solicitor costs in this suit to be taxed, and also the amount so reported to be due as aforesaid, together with the legal interest thereon, from the date of said report, or so much thereof as the purchase money of the mortgaged premises will pay of the same; and that the said commissioner take receipt for the amount so paid, and file the same with his report; and that he bring the surplus moneys arising from said sale, if any there be, into court without delay, to abide the further order of this court.

And it is further ordered, adjudged and decreed, that the defendant and all persons claiming or to claim from or under him, be forever barred and foreclosed of and from all equity of redemption, and claim of, in and to said mortgaged premises, and every part and parcel thereof. And it is further ordered, that the purchaser or purchasers of said mortgaged premises at such sale, be let in possession thereof; and that any of the parties of this cause, who may be in possession of said premises, or any part thereof, and any person who, since the commencement of this suit, has come into possession under them or either of them, deliver possession thereof to such purchaser or purchasers, on production of the commissioner's deed for such premises, and a certified copy of the order confirming the report of such sale, after such order has become absolute. And it is further ordered and decreed, that if the moneys arising from said sale shall be insufficient to pay the amount so reported due to the complainant, with interest and costs and expenses of sale as aforesaid, that said commissioner specify the amount of such deficiency in his report of said sale, and that on the coming in and confirmation of said report, the defendant C D, who is personally liable for the debt secured by said mortgage, pay to the complainant the amount of said deficiency, with interest thereon from the date of such report, and that the complainant have execution therefor. The description and particular boundaries of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the mortgage above referred to or from the bill of complaint in this cause, are as follows, viz.:

(Here insert description.)

A J M,
Circuit Judge.

Countersigned :

T F G.

Register.

Sale of mortgaged premises.—The court has power to decree the sale of mortgaged premises, or such parts as are necessary to discharge the amount due, and costs. But the land can not be ordered sold within one year after the filing of the bill,¹ and it has been held that the court should postpone the sale until the expiration of a year from the service of the subpoena.² If a new defendant is added, the sale can not take place until one year thereafter.³ The rule now provides that sales shall not be ordered on less than six full weeks, or forty-two days' notice; and publication shall not commence until the time fixed by decree for payment has expired, nor within a year after the commencement of suit.⁴ The notice is indispensable, and strict proof of notice must be made and put on record.⁵ All sales must be made by a circuit court commissioner of the county where the decree was rendered, or the land or some part of the same is situated, or by some person duly authorized by the order of the court. The sale must be by public vendue, between nine o'clock in the morning and the setting of the sun, at the court house, or place of holding the circuit court in the county where the estate or some part is situated, or at such other place as the court shall direct.⁶

A sale under decree of foreclosure carries with it the unharvested crops on the mortgaged premises.⁷

Deed on sale.—Deeds shall thereupon be executed by the commissioner or person making the sale, specifying the names of the parties in the suit, the date of the mortgage, when and where recorded, with a description of the premises sold, and the amount bid for the same. When the deed is entered for record, the register of deeds notes on the margin of the original mortgage the book and page of the record of the commissioner's deed.⁸

Notice of sale.—A written or printed notice of the sale must be posted in three public places in the city, village or township where the real estate is to be sold, six weeks previous to the sale, and a copy of such notice shall be published

¹ How. St. § 6701.

² *Ins. Co. v. Renz*, 33 Mich. 299.

³ *Gray v. Bank*, 83 Mich. 365.

⁴ Chan. Rule 28e; see *Culver v. McKeown*, 43 Mich. 332.

⁵ *Perrien v. Fetters*, 35 Mich. 233.

⁶ How. St. § 6707.

⁷ *Dayton v. Estate*, 103 Mich. 65.

⁸ How. St. § 6708.

once in each week for six successive weeks in a newspaper printed and circulated in the county in which such estate is to be sold, if there be one. If there be no newspaper printed in said county, then such notice shall be published for a like time and in a like manner in some newspaper published nearest thereto.¹ The statute, prior to the amendment of 1885, required notices of sale to be posted in the township where the real estate was situated, but it is now only required that notices be posted where the sale is to be made.²

Adjournment of sales.—The commissioner, or other person authorized by the court to make sale of the premises, has power to adjourn the same. If the adjournment is for more than one week, notice of the adjournment must be given in the same newspaper in which the original notice of sale was published, and the publication of the original notice must be continued.³ If, on the day upon which the sale is advertised to take place, or on any adjourned day of the sale, the commissioner is absent or disqualified from acting, the other circuit court commissioner, if there be one who can act, and if not, then a commissioner from an adjoining county, may proceed and make the sale, execute deeds and report to the court, and proceed in all respects as if he had originally advertised the property. Or such commissioner may adjourn the same, publishing the notices in his own name, and make the sale on the adjourned day, unless the commissioner who advertised the same shall be present and competent to proceed, in which case, if he desires, he may do so.⁴ If the term of office of a commissioner expires before the sale shall be consummated, he may still proceed to sell, report to the court, and do all things necessary to perfect the sale. For such purposes his power and authority continues until all such business is fully closed.⁵

If, at the sale, the person making the highest bid neglects or refuses to make an immediate payment of the same bid, the property may at once be resold, or the sale may be adjourned.⁶

¹ Comp. Laws 1897. § 9246.

² *Bap. Union v. Atwell*, 95 Mich. 239.

³ *Isbell v. Kenyon*, 33 Mich. 63.

⁴ How. St. § 7159.

⁵ *Ibid.* § 7159.

⁶ *Ibid.* § 6750.

No. 166. *Form of notice of chancery sale.*

CHANCERY SALE.

In pursuance and by virtue of an order and decree of the circuit court for the county of ———, in chancery, in the State of Michigan, made and dated on the ——— day of ———, A. D. 18—, in a certain cause therein pending, wherein C A R is complainant, and H B R, L A R, C J W, I C V W, and H M P, are defendants.

Notice is hereby given that I shall sell at public auction, to the highest bidder, at the front door of the court house, in the village and county of ———, and State of Michigan, said court house being the place for holding the circuit court for said county, on ———, the ——— day of ———, A. D. 18—, at 10 o'clock in the forenoon, all, or so much thereof as may be necessary to raise the amount due to the said complainant for principal, interest and costs in this cause, of the following described parcel of land, to wit (*here insert description of the premises*): And in making said sale the south half of said above described land will be first sold, and if that be not sufficient to pay the said principal, interest and costs, then so much of the north half of said land adjoining said south half as may be necessary to pay the balance due, with interest and costs, will be next sold, in accordance with the terms of said decree.

Dated ———, Michigan, ———, 188—.

J M D,

Circuit Court Commissioner in and for ——— County, Michigan.

H & R,

Solicitors for complainant.

Sales by parcels.—If the real estate consists of several well known parcels, it should be sold in parcels, separately.¹ No more parcels can be sold than are sufficient to satisfy the mortgage debt.²

Enrollment of decree, etc.—It is provided by Chancery Rule 24a that no process shall issue, or other proceedings be had on any final decree until the same is duly enrolled. And such process unless specially directed by the court, shall be sealed and issued by the register, who shall not suffer any process to pass his seal, if it does not appear to be duly warranted. If a commissioner is directed to sell real estate under such decree, he may give the requisite notice of sale previous to enrollment, but to protect the title of the purchaser, the party for whose benefit the sale is made shall cause the decree

¹ How. St. § 6116, 8503; see *Udell v. Kahn*, 31 Mich. 196; *Lee v. Mason*, 10 Mich. 403; *Griswold v. Fuller*, 33 Mich. 268; *Spear v. Hadden*, 31 Mich. 266; *Vaughn v. Norris*, 36 Mich. 297; *Geney v. Maynard*, 44.

Mich. 578; *Osman v. Traphagan*, 23 Mich. 85; *McComb v. Prentis*, 57 Mich. 225; *Clark v. Stilson*, 36 Mich. 482.

² *Grover v. Fox*, 36 Mich. 462.

to be enrolled, and produce a certificate thereof, before any conveyance shall be executed by the commissioner. And where any decree or decretal order disposes of any part of the merits of the cause, or is necessary to explain the final decree, it shall either be recited therein, or enrolled therewith, as a part of the final decree of the cause.¹

No. 167. Certificate of enrollment.

The Circuit Court for the County of ——. In Chancery.

A B,	}
Complainant,	
<i>vs.</i>	
C D,	}
Defendant.	

I, the undersigned, register of said court, do hereby certify that at the instance of ———, solicitor for the above ———, I have this day attached together for the purpose of enrollment, the bill of complaint, subpoena pleading, proofs, taxed bill of costs, a fair engrossed copy of the final decree, signed by the honorable ———, circuit judge, and countersigned by the register of this court, together with the other papers filed in this cause, and annexed thereto this certificate, according to the statute in such case made and provided.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this ——— day of ———, A. D. 18—.

E F,
Register.

Report and confirmation of sale.—After a sale has been made by a commissioner, he reports the same to the court; and until the same is confirmed, it is subject to the discretionary power of the court to open it for any cause. No right becomes fixed in the purchases until the sale becomes absolute by confirmation.² After the report of the commissioner has been filed, either party may file or enter an order of course confirming the same, unless cause to the contrary thereof be shown within eight days after notice of its being filed. If no exceptions are filed and served within that time, the order will become absolute of course, without further order; or either party may file exceptions and have an order of course to confirm the report, so far as the same is not excepted to, and with like effect.³

¹ See also How. St. 6343-9-50,
7256.

² *Demaray v. Little*, 17 Mich. 386;

Richards v. Morton, 18 Mich. 386;
Howard v. Bond, 42 Mich. 131.

³ Chan. Rule 19b.

No. 163. Commissioner's report of sale.

STATE OF MICHIGAN, }
County of ———, } ss.

In the Circuit Court for the County of ———. In Chancery
In the case between
A B, }
Complainant. }
and }
C D, }
Defendant. }

To the Circuit Court for the County of ———. In Chancery.

In pursuance and by virtue of a decretal order of this court, made in the above cause bearing date the — day of — in the year one thousand eight hundred and —, by which it was, among other things, ordered, adjudged and decreed, that all and singular the mortgaged premises mentioned in the bill of complaint in this cause, and hereinafter described or so much thereof as might be sufficient to raise the amount due to the complainant, for the principal, interest and costs in this case, and which might be sold separately without any material injury to the parties interested, be sold at public auction, by or under the direction of one of the circuit court commissioners of — county, Michigan, at any time after the — day of —, in the year one thousand eight hundred and —; that the said sale be made in the county where the said mortgaged premises or the greater part thereof are situated; that the commissioner give public notice of the time and place of such sale, according to the statute and the course and practice of this court, and that the complainant, or any of the parties to this cause, may become the purchaser; and the said commissioner execute a deed to the purchaser of the mortgaged premises on the said sale, and that the said commissioner, out of the proceeds of said sale, pay to the complainant or his solicitor — costs in this suit to be taxed, and also the amount so reported due as aforesaid, together with interest thereon from date of said report, or so much thereof as the purchase money of the mortgaged premises will pay of the same; and that the said commissioner take receipts for the amount so paid, and file the same with his report; and that he bring the surplus moneys arising from said sale, if any there be, into court without delay, to abide the further order of this court; and that if the moneys arising from said sale be insufficient to pay the amount so reported due, to the complainant, with interest and costs and expenses of sale as aforesaid, that said commissioner specify the amount of such deficiency in his report of said sale.

1. I, the subscriber, J. M D, one of said commissioners, do respectfully certify and report, that having been charged by the solicitor for the complainant with the execution of said decretal order, I advertised said premises to be sold by me at public auction, to the highest bidder, at — (said building being the place of holding the circuit court for the county of —) on the — day of —, in the year one thousand eight hundred and —; that previous to said sale I caused notice thereof to be publicly advertised for six successive weeks, as follows, viz.: By causing printed notices thereof to be fastened up at least six weeks prior to the day said premises were advertised to be sold, in three public places, in the — where said premises are situated, an affidavit showing the fastening up of

which notices is hereto annexed, marked "Exhibit A," and made a part of this my report, and by causing a notice of such sale to be printed once in each week during the — preceding said sale, in the —, a public newspaper printed in said county of —, as appears by affidavit following this report, marked "Exhibit B," which notice contained a description of the mortgaged premises.

2. And I do further report, that on the said — day of —, in the year one thousand eight hundred and —. the day on which the said premises were so advertised to be sold as aforesaid, I attended at the time and place fixed for said sale, — and exposed said premises for sale at public auction — to the highest bidder; and the said premises were then and there fairly struck off to — for the sum of — he being the highest bidder therefor, and that being the highest sum bid.

3. And I do further certify and report, that I have executed, acknowledged and delivered to the said purchaser—, the usual commissioner's deed for said premises, the complainant— having produced a certificate of the enrollment of the final decree in said cause, which is hereto annexed, marked "Exhibit C," and have paid over or disposed of the purchase money or the proceeds of said sale, as follows, viz.: I have paid to the solicitor—, for the complainant—, the sum of \$—, being the amount of costs of this suit as taxed, together with interest thereon from the date of said taxation to the day of the sale, and have taken a receipt therefor, which is hereto annexed.

4. I have also retained in my hands the sum of \$—, being the amount of my fees and disbursements on said sale, as will appear by reference to the statement thereof, annexed to this my report, and to which I refer.

5. And I do further certify and report, that I have paid to the solicitor—, for the complainant—, the further sum of \$—, and have taken a receipt therefor, which is hereto annexed.

6. And I do further certify and report, that the moneys arising from said sale, are insufficient to pay the amount so reported due to the complainant—, with interest, costs and expenses of sale as aforesaid, and I hereby specify the amount of such deficiency to be, and the same is the sum of \$—.

7. And I do further certify and report, that the premises so sold and conveyed as aforesaid, were described in said decretal order, and in the deed so executed by me as aforesaid, as follows, viz.: (*Here insert description.*)

STATE OF MICHIGAN.

The Circuit Court for the County of —. In Chancery.

A B,	Complainant,	}
	vs.	
C D,	Defendant.	}

Received, this — day of —, 18—, of —, the commissioner who made the sale of the mortgaged premises in said cause, — dollars, said sum being part of the proceeds of said sale, and being the amount of complainant's costs of suit as taxed, with interest thereon to date of sale.

H & R,
Complainant's solicitors.

STATE OF MICHIGAN.

The Circuit Court for the County of _____. In Chancery.

A B, Complainant,
vs.
 C D, Defendant.

Received, this ____ day of ___, 18—, of ___, the commissioner who made the sale of the mortgaged premises in said cause, — dollars, said sum being a part of the proceeds of said sale, and being the amount remaining thereof after deducting therefrom the complainant's costs of suit as taxed, and the expenses of said sale.

H & R,
 Complainant's solicitors.

RECAPITULATION.

\$_____ Principal and interest due at date of sale.
 \$_____ Costs and interest due at date of sale.
 \$_____ Commissioner's fees, costs and expenses of sale.

 \$_____ Total amount due at date of sale.
 \$_____ Amount realized on sale of premises.
 \$_____ " " " " reported.

 \$_____ Amount paid to complainant's solicitor on debt.
 \$_____ Amount paid to complainant's solicitor on costs.
 \$_____ Amount of commissioner's fees, costs and expenses of sale retained.

 \$_____

J M D,
 Circuit Court Commissioner,
 _____ County, Michigan.

Dated ___, A. D. 18—.

STATEMENT OF COMMISSIONER'S FEES AND DISBURSEMENTS REFERRED TO IN FOREGOING REPORT.

Printer's bill.....	\$_____
Drawing advertisement.....	_____
Posting notices.....	_____
Mileage.....	_____
Advertising sale.....	_____
Adjourning sale.....	_____
Mileage.....	_____
Attending and making sale.....	_____
Mileage both ways @ 10c.....	_____
Executing and making deed.....	_____
Certifying payment.....	_____
Report of sale....Folios @ 15c.....	_____

No. 169. *Order confirming sale.*

STATE OF MICHIGAN.

The Circuit Court for the County of ——. In Chancery.

A B,	}
Complainant,	
vs.	
C D,	}
Defendant.	

On filing the commissioner's report of sale of the premises described in the bill of complaint entered in this cause, and on motion of H & R, solicitors for the said complainant—, it is ordered, that said sale and all things thereto pertaining, be and stand confirmed, unless cause to the contrary be shown within eight days from this date.

T F G,

H & R,

Register in Chancery.

Solicitors for complainant—.

No. 170. *Affidavit of posting notices.*

STATE OF MICHIGAN, } J M D, of — in said county, being duly
County of Kalamazoo. } ss. sworn, deposes and says that on the — day of —, A. D. 18—, he posted up one notice of — sale of real estate, of which the annexed printed notice is a true copy, at each of the following named places in the —, of —, in said county, to wit: One at —. one at —, and one at —, being three of the most public places in said —, and that said notices were conspicuously and securely posted.

(Here paste copy of
notice posted.)

J M D.

Subscribed and sworn to before me, this — day of —, A. D. 18—.

C A J,

Notary Public,

— County, Mich.

No. 171. *Commissioner's deed.*

This indenture, made this — day of — in the year of our Lord one thousand eight hundred and —, between —, circuit court commissioner in and for the county of —, residing in the —, party of the first part, and — part— of the second part, witnesseth: Whereas, at a session of the circuit court for the county of — in chancery, sitting at the court house, in the — on the — day of — in the year one thousand eight hundred and —, it was, among other things, ordered, adjudged, and decreed by said court, in a certain cause then pending in said court, between A B as complainant, and C D as defendant, for the purpose of foreclosing a certain mortgage bearing date on the — day of —, 18—, and recorded in the office of the register of deeds in and for the county of —, *liber* — of mortgages on page —, on the — day of —, 18—:

That all and singular, the mortgaged premises mentioned and set forth in the pleadings of said cause, described as follows (*describe premises*), or so much thereof as may be necessary to satisfy the amount due said complainant for principal and interest, and costs of this suit, be sold by or under the direction of —, the circuit court commissioner in and for said

county, at public auction, in the county where the said mortgaged premises, or the greater part thereof, are situated, the said commissioner first giving public notice of the time and place of said sale, according to the course and practice of said court.

And whereas, the said party of the first part to these presents, in pursuance of the order and decree of the said court did, on the — day of —, in the year one thousand eight hundred and —, sell at public auction, at —, in the county of —, the said mortgaged premises hereinafter particularly described, having first given the previous notice of the time and place of said sale, as required by the order and decree aforesaid; at which sale the premises were struck off to the said part— of the second part to these presents, for the sum of — dollars, that being the highest sum bid— for the same, and he the highest bidder therefor.

Now, therefore, this indenture witnesseth, that the said — circuit court commissioner for the county of — and State of Michigan, and the party of the first part to these presents, in order to carry into effect the said sale so made as aforesaid, in pursuance of the said decree and order of said court, and also by virtue of the statute in such case made and provided, and in consideration of the premises and of the sum of — dollars, paid by the said part— of the second part to these presents, to the said party of the first part hereto, the receipt whereof is hereby confessed and acknowledged, hath granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, alien, release, convey and confirm unto the said part— of the second part, and to — heirs and assigns forever, all the following lands and premises situated in the — of — in — county and State of Michigan, and known and described as follows (*describe premises*):

Together with all and singular the rights, titles, members, privileges, hereditaments and appurtenances to the same belonging or in anywise appertaining: To have and to hold the said premises above described and hereby intended to be granted and conveyed unto the said part— of the second part, — heirs and assigns, to — and — only proper use, benefit and behoof, forever.

In witness whereof, the said party of the first part, circuit court commissioner, as aforesaid, has hereunto set his hand and seal the day and year first above written.

Circuit Court Commissioner, [L. S.]
— County, Michigan.

Signed, sealed and delivered in the presence of

E. F.
G. H. [L. S.]

STATE OF MICHIGAN, }
County of —, } ss.

On this — day of — A. D. 18—, before the undersigned, personally appeared —, a circuit court commissioner for the county of — in said State, known to me to be the person described in and who executed the above indenture, and acknowledged that he executed the same freely for the uses and purposes therein mentioned.

Notary Public,
— County, Michigan.

Reopening sale and re-sale.—As we have already seen, the court of chancery may set aside or confirm a sale, or if it deems it proper, order a re-sale of the premises. An application to reopen a sale or to re-sell premises, should be made upon petition to the court, or upon special motion founded upon affidavits, due notice in either instance being given to the adverse party. In order to entitle a party to the aid of the court, in the matter now under consideration, he should clearly satisfy the court that there are strong equities in his favor, especially if the application is made by a purchaser.¹ Inadequacy of price is sometimes alleged as a reason for reopening a sale. To make this a ground, the inadequacy must be so glaring as to raise a presumption of fraud, and even then the court will not disturb the sale unless, in addition, it is shown that elements of unfairness exist.²

Among the grounds that are alleged as other reasons for setting aside sales, are irregularity, fraud, mistake, misapprehension and surprise. A much stronger case must be made to set aside a sale after than before the report of sale has been confirmed.³ On the application to set aside a sale, the court will not consider the regularity of the foreclosure proceedings.⁴ If a party claims surprise, he must show that it did not arise through his own negligence.⁵ Where, after confirmation, he claims fraud, he must show that it was unknown to him at the time of the confirmation. He must show that the matters complained of have not arisen through any fault of his own, and that he has not been negligent or guilty of laches.

Writ of assistance.—The court has power to compel the delivery of the premises to the purchaser,⁶ and after the confirmation of the order of sale, and the purchaser has received his deed from the commissioner, a writ of assistance may be granted.⁷ It can never be properly allowed when there is any real controversy as to the right of possession not precluded by the decree.⁸ The purchaser is only entitled to the assistance

¹ *Ledyard v. Phillips*, 32 Mich. 14.

² *Burtch v. Hogge*, Har. Ch. 31;
Bullard v. Green, 10 Mich. 268; *Gilbert v. Haire*, 43 Mich. 283; *Hart v. Lindsay*, Walk. Ch. 72; *Leonard v. Taylor*, 12 Mich. 398; *Goodwin v. Burns*, 21 Mich. 211.

³ *Bullard v. Green*, 10 Mich. 268.

⁴ *Demaray v. Little*, 19 Mich. 244.

⁵ *Ibid.*

⁶ How. St. § 6702.

⁷ *Howard v. Bond*, 42 Mich. 131;
Summers v. Bromley, 28 Mich. 125.

⁸ *Baker v. Pearson*, 5 Mich. 456;
Ramsdell v. Maxwell, 32 Mich. 285;
Howard v. Bond, 42 Mich. 131.

of the court as against the parties to the suit and those who have come into possession under them subsequent to the filing of the notice of *lis pendens*; ¹ and a writ of assistance will not be granted against persons who were in possession of the premises at the time of the commencement of the suit, and who were not made parties.²

How writ of assistance is obtained.—To obtain a writ of assistance, the purchaser should take his commissioner's deed, and a certified copy of the order confirming the sale, with the seal of the court impressed thereon, and show the same to the defendant or party in possession, and demand possession of the premises. Upon being refused, he should apply to the court for the writ.³ The application is made by special motion, or petition, and a notice of the motion, with copies of the affidavits or petition on which it is founded, must be served upon the defendant and the party in possession.⁴ When, by decree, the Supreme Court allows a writ of assistance, it should issue from the Circuit Court.⁵

SECTION VIII.

SURPLUS AND DEFICIENCY.

Proceeds of sale, when brought into court.—The proceeds of every sale made under a decree in chancery, shall be applied to the discharge of the debt adjudged by such court to be due, and of the costs awarded; and if there be any surplus, it shall be brought into court for the use of the defendant or of the person entitled thereto, subject to the order of the court.⁶ If such surplus or any part remains in the court for the term of three months without being applied for, the circuit judge may direct the same to be put out at interest under the direction of the court, for the benefit of the defendant, his representatives or assigns, to be paid to them by the order of such court.⁷

¹ *Benhard v. Darrow*, Walk. Ch. 519.

² *Ramsdell v. Maxwell*, 32 Mich. 235; *Howard v. Bond*, 42 Mich. 131.

³ *Hart v. Lindsay*, Walk. Ch. 144.

⁴ *Benhard v. Darrow*, Walk. Ch. 519.

⁵ *Ryerson v. Eldred*, 18 Mich. 195.

⁶ How. St. § 6709; see *Hanford v. Robertson*, 47 Mich. 100.

⁷ How. St. § 6710.

How disposed of.—Chancery Rule 28*f* provides that on the coming in and confirmation of the commissioner's report of the sale of mortgaged premises, if it shall appear that there is any surplus money remaining in court after satisfying the amount due the complainant, any defendant, on filing an affidavit that such surplus has been paid into court, and that he is entitled to the same or some part thereof, may have an order of course, referring it to a commissioner to ascertain and report the amount due to such defendants, or to any other person, and which is a lien upon such surplus moneys; and to ascertain the priorities of the several liens thereon, to the end that on the coming in and confirmation of the report, such further order and decree may be made for the distribution of surplus moneys as may be just; and every defendant who has appeared in the cause, and every person who has left a written notice of his claim to such surplus moneys with the register where the same are deposited, shall be entitled to notice to attend the commissioner on such reference. And any person making a claim to such surplus moneys who shall fail to establish his claim on the hearing before the commissioner, may be charged with such costs as the other parties have been subjected to by reason of such claim; and the parties succeeding on such reference may be allowed such costs as by the court may be deemed reasonable; but no costs unnecessarily incurred on such reference, or previous thereto, by any of the parties, shall be allowed on taxation to be paid out of such surplus.¹

It has been held that all the parties to the suit must have notice of an application for surplus money;² and if the owner of the equity of redemption dies subsequent to the sale, his personal representatives should also have notice of the application.³

Surplus—Dower in.—A wife entitled to dower under How. Stat. § 6246, on a divorce from her husband, is entitled to dower in the surplus arising upon a foreclosure sale under a mortgage executed prior to their marriage.⁴

Deficiency on foreclosure—Liability of third parties.—The statute provides that "If the mortgage debt be secured

¹ How. St.; § 6709-10; *Moreland v. Houghton*, 96 Mich. 40; *Macomb v. Livingston*, 83 Mich. 483.

² *Smith v. Smith*, 13 Mich. 258.

³ *Ibid.*

⁴ *Bowles v. Hoard*, 71 Mich. 150; *Percival v. Percival*, 56 Mich. 297.

by the obligation or other evidence of debt of any other person besides the mortgagor, the complainant may make such person a party to the bill, and the court may decree payment of the balance of such debt remaining after a sale of the mortgaged premises, as well against such other person as the mortgagor, and may enforce such decree as in other cases.”¹ Under this statute, and the decisions of the court, in order to charge a third party with the payment of a deficiency on a foreclosure sale, his liability must be one that could be sued independently at law as a legal obligation and must be a liability to pay the mortgage debt.²

This provision being statutory can not be enlarged.³

No agreement to pay the mortgage incumbrance can be implied in the conveyance. The statute expressly prevents any such implication. The provision upon that subject says: “No covenant shall be implied in any conveyance of real estate, whether such conveyance contain special covenants or not.”⁴

If a grantee accept a deed, subject to a mortgage incumbrance upon the property conveyed, containing a clause that he shall pay the incumbrance, he will then become liable for the payment thereof, and a personal decree may be rendered against him upon a foreclosure.⁵

Payment by a mortgagor of a deficiency can not be decreed where there are several mortgagees who are not jointly interested in the mortgage.⁶

A decree for deficiency can not be granted where the mortgage does not purport to secure a written promise.⁷

A decree made in advance of sale, for payment of deficiency, is no more than declaratory and fixes no rights.⁸

The indorsers of a mortgage note which has been duly protested for non-payment can be joined as defendants in a suit

¹ How. Stat. § 6704.

² *Vaughan v. Black*, 63 Mich. 215; *Johnson v. Shepard*, 35 Mich. 123; see *Sheldon v. Warner Est.*, 59 Mich. 444; *Winsor v. Ludington*, 77 Mich. 215.

³ *Shelden v. Erskine*, 78 Mich. 627.

⁴ How. Stat. § 5655; *Brown v. Phillips*, 40 Mich. 267.

⁵ *Gage v. Jenkinson*, 58 Mich. 169; *Shields v. Riopelle*, 63 Mich. 458; *Booth v. Life Ins. Co.*, 42 Mich. 299; *Townsend v. Tudor*, 41 Mich. 263; How. Stat. § 6704; *Corning v. Burton*, 102 Mich. 86.

⁶ *Shelden v. Erskine*, 78 Mich. 627.

⁷ *Shelden v. Erskine*, 78 Mich. 627.

⁸ *Shelden v. Erskine*, 78 Mich. 627.

to foreclose the mortgage, and a personal decree can be entered against them for the deficiency arising on a sale of the mortgaged premises.¹

Execution for deficiency.—The power given the court by statute² upon the coming in of the report of sale to decree payment by the mortgagor of any deficiency, and if the debt is secured by the obligation or other evidence of debt, of any other person, a like decree for deficiency against them, and to issue execution therefor is an innovation upon original equitable jurisdiction. It is not a continuation of the foreclosure, but is new and supplementary. It can only be properly authorized, and the execution can only be properly issued, upon the confirmation of the report, showing deficiency.³ Before an execution for deficiency can issue there must be a special application to the court.⁴

How to obtain execution for deficiency.—To obtain an execution for deficiency, the complainant must present to the court a sworn petition, or application in writing, setting forth the facts which give the right to it, and praying the court to direct its issue. It must be served, if possible, upon the defendant against whom the relief is sought, and at the same time serving him with written notice of the time when and the place where the application will be presented to the court. In cases where personal service can not be obtained, the court, upon a showing of the facts, may direct substituted service.⁵

Answer to the application.—The defendant against whom an execution for deficiency is sought, if he desires to resist the application, may reply by an answer, stating therein the grounds of his objection. The answer must be sworn to and placed on file, and in resisting the application the burden is upon the defendant of showing matter in discharge of the decree; for the decree of foreclosure adjudging the defendant personally liable for a deficiency, taken together with the report of the deficiency, makes out a *prima facie* case against him. The defendant can resist the application only on grounds

¹ *Bank v. Trowbridge*, 92 Mich. 217.

² How St. § 6702.

³ *Johnson v. Shepard*, 35 Mich. 122; *Mickle v. Maxfield*, 42 Mich. 304; *Howe v. Lemon*, 37 Mich. 164;

Gies v. Green, 42 Mich. 107; *Brown v. Thompson*, 29 Mich. 72.

⁴ *Gies v. Green*, 42 Mich. 107;

Howe v. Lemon, 37 Mich. 164.

⁵ *Ransom v. Sutherland*, 46 Mich. 489.

that are not inconsistent with the decree, and such as usually operate in its discharge. If his answer presents matter of discharge of the decree, the complainant can take issue on it, and in proper cases the court may order a reference to a commissioner to take proofs.¹

SECTION IX.

INSTALLMENT DUE, PROCEEDINGS ON.

When bill dismissed.—Whenever a bill shall be filed for the satisfaction or foreclosure of any mortgage, upon which there shall be due any interest, or any portion or installment of the principal, and there shall be other portions or installments to become due subsequently, the bill shall be dismissed upon the defendants bringing into court at any time before the decree of sale, the principal and interest due, with costs.²

When proceedings to be stayed.—If, after a decree for sale entered against a defendant in such case, he shall bring into court the principal and interest due, with costs, the proceedings in the suit shall be stayed; but the court shall enter a decree of foreclosure and sale, to be enforced by a further order of the court upon a subsequent default in the payment of any portion or installment of the principal, or of any interest thereafter to grow due.³

Reference in certain cases.—If the defendant shall not bring into court the amount due, with costs, or if for any other cause a decree shall pass for the complainant, the court may direct a reference to a master, to ascertain and report the situation of the mortgaged premises, or may determine the same on oral or other testimony; and if it shall appear that the same can be sold in parcels, without injury to the interests of the parties, the decree shall direct so much of the mortgaged premises to be sold as will be sufficient to pay the amount then due on such mortgage, with costs; and such decree shall remain as security for any subsequent default.⁴

¹ *Ransom v. Sutherland*, 46 Mich. 489.

² How. St. § 6711; *Brown v. Thompson*, 29 Mich. 74; *Vaughn v. Nims*, 36 Mich. 298.

³ How. St. § 6712; *Brown v. Thompson*, 29 Mich. 74; *Perkins v. Perkins*, 16 Mich. 162; *Bank v. Stevens*, Walk. Ch. 6; *Brand v. Smith*, 99 Mich. 395.

⁴ How. St. § 6713.

Default subsequent to decree.—If in the case mentioned in the last paragraph, there shall be any default subsequent to such decree, in the payment of any portion or installment of the principal, or of any interest due upon such mortgage, the court may, upon the petition of the complainant, by a further order founded upon such first decree, direct a sale of so much of the mortgaged premises to be made under such decree as will be sufficient to satisfy the amount so due, with the costs of such petition and the subsequent proceedings thereon, and the same proceedings may be had as often as a default shall happen.¹

Premises, when entire, sold.—If, in any of the foregoing cases, it shall appear to the court that the mortgaged premises are so situated that a sale of the whole will be most beneficial to the parties, the decree shall in the first instance be entered for the sale of the whole premises accordingly.²

Application of proceeds when all sold.—In such case the proceeds of such sale shall be applied as well to the interest portion or installment of the principal due, as toward the whole or residue of the sum secured by such mortgage and not due and payable at the time of such sale, and if such residue does not bear interest, then the court may direct the same to be paid with a rebate of the legal interest, for the time during which such residue shall not be due and payable; or the court may direct the balance of the proceeds of such sale, after paying the sum due, with costs, to be put out at interest for the benefit of the complainant, to be paid to him as the installments or portions of the principal or the interest may become due, and the surplus for the benefit of the defendant, his representatives or assigns, to be paid to them on the order of the court.³

We have already considered the manner in which a defendant not served with process, but brought in by publication, may appear after decree.⁴

¹ Ibid. § 6714; *Bank v. Stevens*, Walk. Ch. 6; *Perkins v. Perkins*, 16 Mich. 162; *Howe v. Lemon*, 37 Mich. 164; *Brown v. Thompson*, 29 Mich. 72.

² Ibid. § 6715; *Disbrow v. Jones*, Har. Ch. 48.

³ Ibid. § 6716.

⁴ *Ante*, page 62.

SECTION X.

STRICT FORECLOSURE.

Whether allowable.—As a general rule strict foreclosure of a mortgage or other liens will not be permitted where there are other creditors, or other incumbrances upon the property, or purchasers of the equity of redemption; but where it appears that the property is of less value than the debt for which it was mortgaged, and the mortgagor is insolvent, and the mortgagee is willing to take the property in discharge of his debt, a strict foreclosure may be allowed.¹

Decree of strict foreclosure.—A decree of strict foreclosure of a mortgage, after finding the sum due on the mortgage, and that the value of the mortgaged premises was much less than that sum, ordered and decreed that the defendants pay the sum so found due, with six per cent interest thereon, within ninety days, and that in default of such payment within the time fixed, the defendants be forever barred and foreclosed of all right and equity of redemption in and to the mortgaged premises, and every part thereof; and that on such default, all the right, title and interest, both legal and equitable, of the defendants, in and to said premises, and every part thereof, should become vested, absolutely and forever, unconditionally, in the complainant. It was held that such a decree was a final one, and vested the title and estate of the mortgagor in the complainant without any further order or decree of the court after the time allowed for payment had elapsed.²

No. 172. Bill for strict foreclosure.

(*Venue and address as in No. 157, ante, page 350.*)

Your orator, A B, etc., respectfully represents that, on, etc., one C D, of, etc., one of the defendants hereinafter named, became and was indebted to your orator in the sum of — dollars, and being so indebted, on the same day, and in consideration thereof, made and executed to your orator

¹ *Ill. Starch Co. v. Hydraulic Co.*, 125 Ill. 237; see *Farwell v. Parker*, 50 Ill. 275; *Boyer v. Boyer*, 89 Ill. 447.

² *Ellis v. Leck*, 127 Ill. 60; see

Wilson v. Geisler, 19 Ill. 49; *Stephens v. Bichnell*, 27 Ill. 444; *Chickering v. Failes*, 26 Ill. 507; *Mulvey v. Gibbons*, 87 Ill. 380; 1 Smith's Ch. Pr. 240; 2 Dan. Ch. Pr. 993.

his promissory note of that date for that amount, payable to your orator — after date with interest, etc., as by the said note when produced, and a copy of the same hereto attached, marked “Exhibit A,” and made a part of this bill of complaint, will more fully appear.

2. Your orator further represents that the said C D, and E D, his wife, on, etc., to secure the payment of the principal sum and interest mentioned in the said promissory note, made and executed under their hands and seals, and delivered to your orator a mortgage, conditioned for the payment of the said sum of — dollars and interest mentioned in said note, according to the tenor and effect thereof; by which said mortgage the said C D, and E D, his wife, conveyed to your orator, in fee, the following described real property, to wit : (*here insert a description of the mortgaged premises;*) which said mortgage was duly acknowledged, and afterward, on, etc., duly recorded in the office of the recorder of the said county of —, in the State of —, in book — of mortgages, at page —, as by the said mortgage and its accompanying certificates of acknowledgment and recording, ready to be produced in court, and a copy of the same hereto attached, marked “Exhibit B,” and made a part of this bill, will more fully appear.

3. Your orator further represents that the sum of — dollars, with interest thereon, from, etc., remains due and unpaid to your orator on the said note and mortgage, and that no proceedings at law have been had to recover the debt secured thereby, or any part thereof.

4. Your orator further represents that the said C D is now wholly insolvent, and unable to redeem the said premises; and that the said mortgaged property is meager and scant security for the said sum of — dollars, and the interest mentioned in the said note and mortgage, and now due your orator; and that the value thereof is wholly insufficient to pay the amount so due, with the costs of this proceeding.

5. Your orator further represents that no proceedings at law have been had to recover the said debt secured by said note and mortgage, or any part thereof; and no part of said debt has been collected or paid.

6. And your orator further represents that E F and G H, of, etc., have, or claim to have, some interest in the said mortgaged premises, or some part thereof, as judgment creditors or otherwise, which interests, if any, have accrued subsequent to the lien of the said mortgage of your orator, and are subject thereto.

Forasmuch, therefore, as your orator is without remedy in the premises, except in a court of equity, your orator prays :

I. That the said C D, E D, E F and G H, who are made parties defendant to this bill, may be required to make full and direct answer to the same *but not under oath, the answer under oath being hereby waived ;*

II. That an account may be taken in this behalf, by or under the direction of this honorable court, that the defendants or some of them may be decreed to pay to your orator what may be found due to him on taking the said account, together with his costs of this suit, by a short day to be appointed by the court for that purpose; or, in default thereof, that the defendants, and all persons claiming under them, may be absolutely and forever debarred and foreclosed of and from all right and equity of redemption in or to the said mortgaged premises, and every part thereof; and

III. That the said C D may deliver up to your orator all deeds, papers or writings in his custody or power relating to or concerning the said mortgaged premises, or any part thereof. (Your orator being ready and willing to take said mortgaged premises in full discharge of the amount so due him as aforesaid.)

IV. And that your orator may have such other and further relief in the premises as equity may require and to your honor shall seem meet.

May it please, etc. (*Pray process as in No. 157, ante, page 353, and add exhibits.*)

No. 173. Decree of foreclosure and sale on hearing.

(*Caption and title of cause, as in No. 165, ante, page 368.*)

This cause having come on to be heard upon the bill of complaint herein, the answers of the defendants thereto, the replication of the complainant to such answers, and the proofs taken in said cause, and having been argued by counsel for the respective parties; and the court being fully advised in the premises doth find that the allegations in the said bill contained are true as therein stated, and that the equities of this cause are with the complainant; and that there is now due from the defendant C D to the complainant, for principal and interest on said note and mortgage, the sum of — dollars. (*)

It is therefore ordered, adjudged and decreed, etc. (*Proceed as in No. 165, ante, at page 368.*)

No. 174. Decree of strict foreclosure.

(*If upon a hearing, proceed as in No. 173, last form, to the asterisk (*), and then as follows:*) And the court further finds that the defendant, C D, is now wholly insolvent and unable to redeem the said mortgaged premises; and that the said mortgaged premises is meager and scant security for the amount so found to be due as aforesaid, and that the value of said premises is wholly insufficient to pay the amount so found to be due and the costs of this proceeding; and that no benefit can inure to the defendants, or either of them, by a sale of said mortgaged premises. (*)

It is therefore ordered, adjudged and decreed, by the court, that the defendant pay to the complainant within — months from this date, the said sum of — dollars, with lawful interest to be computed thereon from this day until paid, and also the costs of this suit, to be taxed by the clerk of this court.

And it is further ordered that upon the defendant paying to the complainant the sum of — dollars as aforesaid within the time above mentioned, that the complainant do reconvey the said mortgaged premises to the defendant, C D, by a suitable or proper instrument of conveyance, to be approved by the master in chancery of this court, in case the said parties can not agree upon the form thereof; and further that the complainant cancel and discharge such mortgage of record. But in case of default of the defendant's paying to the complainant such principal, interest and costs as aforesaid, by the time limited for that purpose, then it is ordered, adjudged and decreed, that the defendant be forever barred and foreclosed from all equity of redemption, and claim of, in and to said mortgaged premises, to-wit:

(*Here describe the mortgaged premises*) and to any part thereof; and that the complainant or his legal representatives or assigns, be let into possession thereof; and that the parties in this cause, who may be in possession of said premises, or any part thereof, and any person who, since the commencement of this suit, has come into possession under them, or either of them, on the production of the circuit court commissioner's deed for the premises and a certified copy of this order surrender the possession thereof to the complainant, his representatives or assigns, and on refusal so to do be considered in contempt of this court.

CHAPTER XXX.

CREDITOR'S BILL.

- Section 1. WHEN A CREDITOR'S BILL MAY BE FILED.
2. WHAT MAY BE REACHED BY.
3. PARTIES TO THE BILL.
4. PRIORITY AND LIEN OF BILLS.
5. FRAME OF BILL.
6. RECEIVER.

SECTION I.

WHEN A CREDITOR'S BILL MAY BE FILED.

The jurisdiction of a court of chancery in suits brought by judgment creditors to enforce the collection of their judgments after having exhausted their remedy at law, although it may have previously existed, is generally expressly declared and particularly defined by statutes. The statute of Michigan, with respect to bills of this nature, which is the foundation of the present practice of the court in such cases in this State, is as follows :

“Whenever an execution against the property of a defendant shall have been issued on a judgment at law, and shall have been returned unsatisfied in whole or in part, the party suing out such execution may file a bill in chancery against such defendant and any other persons, to compel the discovery of any property or things in action belonging to the defendant, and of any property, money or things in action due to him or held in trust for him; and to prevent the transfer of any such property, money or things in action, or the payment or delivery thereof to the defendant, except where such trust has been created by, or the fund so held in trust has proceeded from, some person other than the defendant. The court shall have power to compel such discovery, and to prevent such transfer, payment or delivery, and to decree satisfaction of the amount

remaining due on such judgment, out of any property, money or things in action belonging to the defendant or held in trust for him, with the exception above stated, which shall be discovered by the proceedings in chancery, whether the same were originally liable to be taken in execution at law or not: *Provided*, this act shall not apply to property exempt from execution."¹

The statutes of Illinois and New York upon this subject are almost identical with our own.² The decisions of those States are therefore of peculiar value in regard to the pleadings and practice under it.

In order to maintain a strict creditor's bill within the meaning of the section of the Michigan statute, which we have quoted, the remedy at law must appear to have been exhausted by obtaining a judgment, and, if the defendant was not insolvent, an execution returned *nulla bona*.³ But the law is otherwise where a creditor by his bill merely seeks to remove a fraudulent conveyance out of the way of his execution. In that case the bill must show that the judgment was an existing lien on the property conveyed. If it appears that a year had elapsed after the rendition of the judgment without an execution being issued thereon, the bill can not be maintained.⁴ The bill must be filed within a reasonable time after the return of the execution.⁵

The creditor's bill being a harsh remedy, the relief sought will not be granted unless the creditor shows a strict and rigid compliance with the rules and forms of law.⁶

It is the well settled law of Michigan and elsewhere that creditors can not attack the interest of third parties, alleged to have been obtained by fraud, until they have obtained a standing by legal proceedings.⁷

¹ Comp. L. 1871, §§ 5050, -5061; How. St. §§ 6614, 6615.

² Illinois Rev. Stat. (1874) 203; (1877) 189; New York Rev. Stat.

³ *Miller v. Davidson*, 3 Gilm. 518; *Newman v. Willetts*, 52 Ill. 98.

⁴ *Newman v. Willetts*, 52 Ill. 98; *Weightman v. Hatch*, 17 Ill. 281; see also *Greenway v. Thomas*, 14 Ill. 271; *Turner v. Adams*, 46 Mo. 95; *Webster v. Folsom*, 58 Maine, 230;

Bailey v. Burton, 8 Wend. 339; *Weis v. Tiernan*, 91 Ill. 27; *Shufelitt v. Boehm*, 96 Ill. 560; *Lucas v. Lucas*, 103 Ill. 121.

⁵ *Gould v. Tryon*, Walk. Ch. 353.

⁶ *Thayer v. Swift*, Har. Ch. 430; *Tyler v. Pratt*, 30 Mich. 62; *Preston v. Wilcox*, 38 Mich. 578.

⁷ *Scott v. Chambers*, 62 Mich. 532, 538; *Root v. Potter*, 59 Mich. 498.

Except for the statute, a creditor's bill is like any other suit, a mere personal litigation, to which the death of the judgment debtor puts an end, where no lien was attached.¹

Justice's judgment.—A judgment before a justice of the peace is a sufficient foundation for a creditor's bill, if the amount is large enough to confer jurisdiction on the court.² In such a case it would seem to be the proper practice to have a transcript of the justice's judgment filed in the Circuit Court, and an execution issued from the Circuit Court and returned unsatisfied.

In the United States court.—A creditor's bill may be filed in the Circuit Court of the United States, in the mode authorized by the local State law.³ But a bill will not lie in a State court on a judgment obtained in the Federal court.⁴

The statute does not bar equitable relief in cases where compliance with the statute is rendered impossible by death or removal from the State or the non-residence of the debtor.⁵

When proper.—It was held, in the case of *Williams v. Hubbard*,⁶ that there are two classes of cases in which a judgment creditor may come into a court of chancery for relief: *First*, in aid of his execution at law; as, to set aside an incumbrance or a transfer of property made to defraud creditors. *Second*, to have his judgment paid out of *choses in action*, or other property of the debtor not liable to execution.⁷

Relief is given in these two classes upon different principles. In the first class, on the ground of fraud, and in the other on the ground that the complainant has exhausted his remedy at law, and that it is inequitable and unjust for the debtor, under such circumstances, to refuse to apply any *choses in action*, or other property belonging to him, not liable to execution, in payment of the judgment.

To entitle a party to the aid of the court, in the first class of cases, an execution must have been issued, but it is not nec-

¹ *Seminary v. Saenger*, 66 Mich. 251; *Jones v. Smith*, Walk. Ch. 115.

² *Steere v. Hoagland*, 39 Ill. 264; *Smets v. Williams*, 4 Paige, 366; *Vanchief v. Sickles*, 5 Paige, 506; 2 Hoff. Ch. Pr. 121.

³ *Snydam v. Beals*, 4 McLean, 12; *Launnon v. Clark*, Id. 18; *Wilkin-*

son v. Yale, 6 McLean, 16; see *Babcock v. Willard*, 4 West. Law Monthly, 314.

⁴ *Steere v. Hoagland*, 39 Ill. 264.

⁵ *Earle v. Kent*, *Circuit Judge*, 92 Mich. 285.

⁶ Walk. Ch. 28.

⁷ *Beck v. Burdett*, 1 Paige R. 305.

essary that it should have been returned; or, if it has been, that a new execution has been taken out. The right to come into court for relief in this class of cases is complete the moment the execution issues. The fraudulent conveyance then works an injury to the creditor by hindering and delaying him in the collection of his judgment.² But when the creditor asks to have his judgment satisfied out of property belonging to the debtor not liable to execution, he must show not only that an execution has been taken out, but that it has been returned unsatisfied in whole or in part.

This should be shown by the officer's return to the writ, which, to be a good and sufficient return for that purpose, should be such a return as would subject the officer to an action at the suit of the debtor, for a false return, if a bill should be filed against him when he had property that might have been levied on and sold to satisfy the execution.³

A creditor's bill must be sworn to, but a bill in aid of execution need not be.⁴

In aid of execution.—Where an execution has been levied upon property of the judgment debtor fraudulently conveyed or incumbered by him, or otherwise subject to fraudulent obstructions interposed to prevent its application to the payment of his debts, a bill may be maintained to remove such obstruction or cloud, and to subject the property to sale under the levy.⁵

The creditor should first obtain a lien upon the property by means of a levy.⁶

A creditor can follow the debtor's interest in lands in the hands of a fraudulent vendee.⁷

¹ *Williams v. Hubbard*, Walk. Ch. 28; *Clarkson v. De Peyster*, 3 Paige R. 320; *McElwain v. Willis*, 9 Wend. R. 548; *Gibbons v. L'emberton*, 101 Mich. 397.

² Walk. Ch. 28; *Thayer v. Swift*, Har. Ch. 450; *Messmore v. Hugard*, 46 Mich. 558.

³ *Williams v. Hubbard*, Walk. Ch. 28.

⁴ *Moore v. Chieseman*, 23 Mich. 335; See Chan Rule 30c.

⁵ *Thayer v. Swift*, Har. Ch. 430.

⁶ *McKibben v. Barton*, 1 Mich. 213; *Cleland v. Taylor*, 3 Mich. 206; *Griswold v. Fuller*, 33 Mich. 265; *Tyler v. Peatt*, 30 Mich. 65; see also *Enslow v. Mitchell*, 26 Mich. 500; *Miller v. Babcock*, 29 Mich. 526; but see *Thayer v. Swift*, Har. Ch. 430; *Williams v. Hubbard*, Walk. Ch. 28; *Beach v. White*, 26 Mich. 495.

⁷ *Trust Co. v. Chapin*, 64 N. W. Rep. 5.

A bill in equity will lie for the double purpose of aiding an execution and of reaching property that is not open thereto;¹ and such a bill is not multifarious.²

A bill in aid of an execution can not affect lands in another county than that in which it is filed.³

A conveyance from a father to his daughter can not be set aside as fraudulent in respect to creditors where the consideration therefor is not apparently excessive and consists of the amount due on a note from him to her, with interest, and embraces her services in their support, and her agreement to support them in future. Parents have a right, as against creditors, to compensate their children for their services in supporting them.⁴

A bill in aid of execution must precede a sale under the execution.⁵

Section 6108 of How. Stat. provides that in case of a levy upon the equitable interest of a judgment debtor, the judgment creditor may, before sale, institute proceedings in aid of said execution to ascertain the rights and equities of said judgment debtor in the premises so levied upon, and that in case of a sale of said premises, without having ascertained and determined the interest of said judgment debtor in the premises, he shall, within one year, institute proceedings to ascertain and determine the same, and to settle the rights of the parties in interest therein.⁶

The statute authorizing the filing of bills in aid of executions includes equitable as well as legal interests in land, and covers a partially paid-up land contract assigned in fraud of creditors; said assignor having at least an equitable interest, with the right to obtain the absolute title upon full payment.⁷

Where the premises which the complainant sought to reach had been deeded by the judgment debtor to his daughter before the complainant's claim arose, and while he was solvent,

¹ *Beam v. Bennett*, 51 Mich. 48; 307; see *Hill v. Bowman*, 35 Mich. 191; *Jordan v. White*, 38 Mich. 254.
² *Williams v. Hubbard*, Walk. Chan. 28. ³ *Marshall v. Blair*, 83 Mich. 518.

⁴ *Clark v. Davis*, Walk. Ch. 227.

⁵ See *Edsell v. Nevins*, 80 Mich. 146.

⁶ *Krolík v. Bulkley*, 58 Mich. 407; How. Stat. § 6612.

⁷ *Cutcheon v. Buchanan*, 83 Mich.

⁸ *Howard v. Rynearson*, 50 Mich. 594.

in consideration of the daughter's kindness and attention to him in sickness, and where, though the grantor had kept the deed in his own custody, he had repeatedly recognized its execution and delivery to the daughter, who had for years occupied the premises with the understanding, on the part of the family, that they belonged to her, a creditor's bill in aid of an execution was dismissed.¹

A deed of land to a wife in payment of a debt owing to her by her husband is not a voluntary conveyance, nor fraudulent with respect to his other creditors.²

Where judgment creditors, who had levied an execution upon real estate, filed a bill in aid of such execution, charging the fraudulent character of a mortgage given by the execution debtor to his father on said land, and also attacked certain transfers of personal property made by the son to his father as fraudulent, but failed to show that any execution lien had been acquired thereon, it was held, that the right to file said bill to remove said mortgage was unquestioned; but beyond this they could not go, under the bill filed, until the execution was returned unsatisfied.³

Equitable assets.—As stated in *Williams v. Hubbard*, *supra*, a creditor must first obtain a valid judgment and seek to collect his debt by execution before he can resort to the equitable estate of his debtor.⁴

A bill in aid of execution can not be so drawn as to reach property that is not leviable if filed while the execution is still in force and unreturned.⁵

A creditor's bill to reach equitable assets can not be filed until the remedy at law has been exhausted; and the remedy at law is not exhausted until an execution has been issued and

¹ *Dunham v. Petkin*, 53 Mich. 504; *Shay v. Wheeler*, 69 Mich. 254.

² *Meigo v. Dibble*, 73 Mich. 101; *Wooden v. Wooden*, 72 Mich. 347.

³ *Tarbell v. Millard*, 63 Mich. 250.

⁴ *Smith v. Thompson*, Walk. Ch. 1; *Millar v. Babcock*, 29 Mich. 526; *Thayer v. Swift*, Har. Ch. 432; *Freeman v. Bank*, Walk. Ch. 68; *Wharton v. Fitch*, Walk. Ch. 143; *Beach v. White*, Walk. Ch. 495; *Stafford v. Hulbert*, Har. Ch. 430; *Eldred v.*

Camp, Har. Ch. 162; *Steward v. Stevens*, Har. Ch. 169; *Williams v. Hubbard*, 1 Mich. 446; *Kellogg v. Hamilton*, 43 Mich. 269; *Maynard v. Hoskins*, 9 Mich. 485; *Tyler v. Pratt*, 30 Mich. 63; *Tarbell v. Millard*, 63 Mich. 250; *Vanderpool v. Motley*, 71 Mich. 422; *Bank v. Dwight*, 83 Mich. 189; *Grenell v. Ferry*, 110 Mich. 262.

⁵ *McCullough v. Day*, 45 Mich. 554.

returned unsatisfied. And for this purpose it can not be returned until the return day, even though the bill is not filed until after the return day.¹

And a return that the sheriff has property in his hands for want of bidders is insufficient.²

It is not necessary for the assignee of a judgment to cause an execution to be issued and returned *nulla bona*, after becoming such assignee, before he can file a creditor's bill, where an execution has been so issued and returned prior to such assignment.³

Where an execution has not been issued and returned unsatisfied before the filing of a creditor's bill, the defect can not be cured by a supplemental bill setting forth the issuance of an alias execution after the original bill was filed, and its return unsatisfied.⁴

Trust funds.—When a trust created by will directs that the surplus of the income after providing a fair support for the *cestui que trust* shall be paid to him, the excess may be reached by a creditor.⁵

The statutes except from the operation of a creditor's bill trust funds, where the same have been created by, or the fund so held in trust has proceeded from, some person other than the defendant.⁶

Where a wife, who had a separate estate when she was married, made her husband, who was an insolvent debtor, the executor of her will, in which she provided, after making other bequests, that he should have the use of the remainder during his lifetime, and that on his death it was to be divided as directed in the will, it was to be kept invested, and no encroachment was to be made upon the principal, except in emergencies, it was held, that this will created a trust for the husband's benefit, and that the fund was beyond the reach of a creditor's bill against the husband, as the trust was not created by the defendant.⁷

¹ *Stewart v. Stevens*, Walk. Ch. 169; *Thayer v. Swift*, Ib. 430; *Stafford v. Hulbert*, Ib. 435; *Jenks v. Horton*, 72 N. E. 20; *Vanderpool v. Notley*, 71 Mich. 422; *Brook v. Rich*, 76 Mich. 644; *Bank v. Dwight*, 83 Mich. 189.

² *Eldred v. Camp*, Walk. Ch. 162.

³ *Rankin v. Rothschild*, 78 Mich. 10.

⁴ *Grenell v. Ferry*, 68 N. W. Rep. 5.

⁵ *Spring v. Randall*, 64 N. W. Rep. 1063; 107 Mich. 103.

⁶ How. St. § 6614.

⁷ *Cummings v. Corey*, 58 Mich. 494; *Nichols v. Levy*, 5 Wall. 433; *Spindle v. Shreve*, 111 U. S. 542; 19 N. J. Eq. 316; 35 N. Y. 361; 11 Paige Ch. 136; 91 U. S. 716-728.

SECTION II.

WHAT MAY BE REACHED BY.

Upon a creditor's bill every species of property belonging to the debtor may be reached and applied to the satisfaction of his debts; and his debts, choses in action and other equitable rights, may be assigned or sold under the decree of the court for that purpose.¹

Upon a bill of this nature the complainant may reach the defendant's interest in the effects of a copartnership, after payment of the partnership debts, and satisfying all prior equities in favor of his copartners.² So, where an express trust has been created to receive the interest or income of trust property and to apply it to the use of a person from time to time, the surplus beyond what is necessary for his support and maintenance may be reached by a creditor's bill, after such interest or income has become due.³

A creditor's bill will not lie to reach assets of the debtor which the latter can not recover in an action in his own name.⁴

On a creditor's bill the court may so control the custody of negotiable notes, and provide for demand and notice, as to prevent their being negotiated, and protect the rights of all parties thereto.⁵

The complainant, by his bill, can only reach the property which belonged to the defendant at the time of the commencement of the suit, or the proceeds of the property and effects in which he then had an interest. If he wishes to reach after-acquired property, he must file a supplemental bill.⁶ Upon this principle it has been held, that the complainant in a cred-

¹ *Edmeston v. Lyde*, 1 Paige Ch. 637; see *Craig v. Hone*, 2 Edw. Ch. 551; *Weed v. Pierce*, 9 Cow. 722; *Congden v. Lee*, 3 Edw. Ch. 304; *Thompson v. Nixon*, Ib. 457; *Brewster v. Power*, 10 Paige Ch. R. 562; *Benson v. Le Roy*, 4 Johns. Ch. R. 651; *Cohen v. Carroll*, 5 S. & M. 545; *Wagoner v. Speck*, 3 Ham. 294; *Platt v. Judson*, 3 Blackf. 235; *Demaree v.*

Driskell, Ib. 115; *Griswold v. Fuller*, 33 Mich. 273.

² *Eager v. Price*, 2 Paige Ch. R. 334.

³ *Clute v. Bool*, 8 Paige Ch. R. 83; see *Craig v. Hone*, 2 Edw. Ch. 554.

⁴ *Bonte v. Cooper*, 90 Ill. 440.

⁵ *Buckcock v. Millard*, 4 West. Law Mo. 314.

⁶ *Sampson v. Taylor*, cited in 2 Barb. Ch. Pr. 153.

itor's bill can not reach the salary or compensation which is to become due to the defendant at a future time, for the performance of services which had not been completed at the time of filing the bill, in a case where the defendant would have no legal or equitable right to demand payment for the services already performed, if he should thereafter neglect to complete the unperformed services.¹ Where work is performed by the piece or lot the wages therefor may be reached by a creditor's bill, filed after the work has been performed, though before the customary day of payment.²

The interest of a debtor under a contract for the purchase of land, can be reached by a creditor's bill.³ So a note held by a defendant, secured by a deed of trust on land, may be subject to a creditor's bill, and the land conveyed by the deed of trust be sold to pay it.⁴

Where a debtor purchased land with his own money, and took the conveyance in the name of his infant son, for the purpose of securing the land against his debt, it was held that the creditor, at the time of such conveyance, having obtained a judgment, might, by bill in equity, subject the land to his debt.⁵

In Michigan, lands which a judgment debtor has purchased since 1846, and caused to be conveyed by the vendor directly to a third person to defraud his creditor, are not subject to sale and execution. The legal title resting in the grantee, the only remedy for creditors is to take out their execution, and the same being returned unsatisfied, to then file a creditor's bill and thus reach the trust in favor of creditors.⁶ When the

¹ *Browning v. Bettis*, 8 Paige Ch. 530; *McConn v. Dorsheimer*, 1 Clarke, 144.

² *Thompson v. Nixon*, 3 Edw. Ch. 457.

³ *Brewster v. Power*, 10 Paige Ch. 562.

⁴ *Cohen v. Carroll*, 5 S. & M. 545.

⁵ *Demaree v. Driskell*, 3 Blackf. 115; see *Weightman v. Hatch*, 17 Ill. 281; *Moritz v. Hoffman*, 35 Ill. 553; *Newman v. Willets*, 52 Ill. 98; *Mugge v. Ewing*, 54 Ill. 236; *Mann v. Ruby*, 102 Ill. 348; *Jackson v. Miner*, 101 Ill. 550.

⁶ Comp. L. 1871, §§ 4120, 4121; How. St. §§ 5569, 5570; *Trask v. Green*, 9 Mich. 358; *Goesbeck v. Seeley*, 13 Mich. 329; *Palmer v. Sterling*, 41 Mich. 221; *Maynard v. Hoskins*, 9 Mich. 485; *Weare v. Linnell*, 29 Mich. 224; *Hooker v. Axford*, 33 Mich. 454; *Brown v. Bronson*, 35 Mich. 415; *Munch v. Shabel*, 37 Mich. 137; *Russell v. Miller*, 26 Mich. 3; *Jackson v. Cleveland*, 15 Mich. 94; *Harwood v. Underwood*, 28 Mich. 431.

person taking a conveyance in his own name, does so in fraud of the rights of the person paying the consideration, or without his consent, the statute does not apply. In such case the trust results to the one who furnishes the purchase money.¹

SECTION III.

PARTIES TO THE BILL.

Complainants.—A creditor may file his bill in his own name, for his own benefit, without joining other creditors; or he may file a bill in behalf of himself and all others, being judgment creditors, whose executions have been returned unsatisfied, and who may choose to come in and contribute to the expense of the suit.² But a creditor can not sue on behalf of himself and others who have no common interest with him.⁴

Judgment creditors, who have exhausted their remedies at law, may unite in a bill to set aside a fraudulent assignment by their debtor.⁵ So, if one creditor by judgment, and another by decree, have acquired liens upon the property of their debtor, they may join in filing such a bill.⁶ But as to property, on which no creditor has obtained a lien by judgment and execution, a creditor who has exhausted his legal remedy may file a bill for his own benefit only, without making other creditors, standing in the same situation, parties.⁷ Other creditors may come in after the bill has been filed;⁸ and the court should call in all the creditors of the estate to receive dividends.⁹

¹ Comp. L. 1871, § 4122; How. St. § 5571; *Linsley v. Sinclair*, 24 Mich. 390; *Fisher v. Fobes*, 22 Mich. 454; *Ransom v. Ransom*, 31 Mich. 301.

² *Balentine v. Beall*, 3 Scam. 203.

³ *Edmeston v. Lyde*, 1 Paige, Ch. 637; *Wakeman v. Grover*, 4 Paige, Ch. 23; *Lentilhon v. Moffat*, 1 Edw. Ch. 451.

⁴ *Burney v. Morgan*, 1 Sim. & Stu. 358.

⁵ *Lentilhon v. Moffat*, 1 Edw. Ch. 451; *Bailey v. Burton*, 8 Wend. 329; *Dunyan v. Vattier*, 3 Blackf. 245.

⁶ *Clarkson v. De Peyster*, 3 Paige Ch. 320.

⁷ *Wakeman v. Grover*, 4 Paige Ch. 23; *McCalmont v. Lawrence*, 1 Blatchf. C. C. R. 232; *Pennell v. Lamar Ins. Co.*, 73 Ill 303.

⁸ *The Bank, etc., v. Dunyan*, 2 Bland. 254; see Story's Eq. Pl. § 99-102; *Myers v. Fenn*, 5 Wallace, 205.

⁹ *Kinney v. Harvey*, 2 Leigh, 70; *Williamson v. Wilson*, 1 Bland. 418; see *Brooks v. Gibbons*, 4 Paige Ch. 374; *Parmlee v. Egan*, 7 Paige Ch. 610; *Birley v. Staley*, 5 Gill & J. 432; *Shubrick v. Shubrick*, 1 McCord Ch. 406; *Wabash & Erie Canal Co. v. Beers*, 2 Black, U. S. R. 448.

Where the plaintiff in a judgment, after execution thereon returned unsatisfied, assigns the judgment, the assignee may file a bill of this nature in his own name, without taking out a new execution after the assignment.¹

Where a party indorses a note upon which judgment is obtained by the assignee, and on failure to collect the same, he pays the assignee the amount of the judgment, taking an assignment thereof to himself, he will be subrogated to all the rights of the judgment creditor, and may maintain a creditor's bill for the collection of such judgment.²

Defendants.—It is a general rule that all the parties against whom the judgment was recovered should be made parties defendant to a bill of this nature.³ But if one of them is insolvent and wholly destitute of property, or out of the jurisdiction of the court, or a mere surety for the other defendants it is not necessary to make him a party. These facts must, however, be distinctly averred in the bill, or the defendants may demur for want of parties.⁴ Even where one joint debtor has not been served with process at law, it is proper to make him a party to the bill; for although his separate property can not be reached directly, yet his co-defendants, if compelled to pay the debt, may claim contribution.⁵

If the property of the judgment debtor, against whom an execution has been returned unsatisfied, is in the actual possession and control of his wife, under circumstances which render it impossible to reach and obtain possession of it by a creditor's bill filed against the husband alone, it seems a bill may be filed against her and her husband jointly, so as to obtain a decree which will reach the property in her hands and compel her to deliver it up for the satisfaction of her husband's debts.⁶

¹ *Andrews v. Kibbe*, 12 Mich. 94; *Rankin v. Rothschild*, 78 Mich. 10; *Gleason v. Gage*, 7 Paige Ch. 121; *Strange v. Longley*, 3 Barb. Ch. R. 650.

² *Crawford v. Logan*, 97 Ill. 396.

³ *Child v. Brace*, 4 Paige Ch. R. 309; *Commercial Bank of Lake Erie v. Meach*, 7 Paige Ch. R. 449; *Spear v. Campbell*, 4 Scam. 424.

⁴ *Van Cleaf v. Sickles*, 5 Paige Ch. 505; *Commercial Bank of Lake Erie v. Meach*, 7 Paige Ch. R. 449; *Williams v. Hubbard*, 1 Mich. 450.

⁵ *Id.*; *Ib.*; 2 Barb. Ch. Pr. 155; see *Thomas, Trustee, v. Adams*, 30 Ill. 37.

⁶ *Copous v. Kauffman*, 8 Paige Ch. 585; see *Webster v. Folsom*, 58 Maine, 230.

Judgment creditors are necessary parties in proceedings to subject lands upon which they have liens to the payment of other judgment liens.¹

If a debtor has conveyed different portions of his property to different persons, in fraud of his creditors, all the grantees may be joined in one bill with the grantor.² So, two or more persons holding the property of the judgment debtor under different conveyances, or becoming indebted to him at different times, or for distinct sums, may be joined with him as defendants in a creditor's bill.³

A debtor to the judgment debtor may be made a party defendant to a creditor's bill, for the purpose of compelling him to pay to the complainant the debt which he owes to the judgment debtor. But he is not a necessary party; and he is, in general, entitled to his costs out of the fund recovered. If there is no fund, the complainant is frequently compelled to pay them himself.⁴

Creditors and legatees are exceptions to the general rule requiring all persons interested in the subject of the bill to be made parties.⁵

SECTION IV.

PRIORITY AND LIEN OF BILLS.

The filing of a creditor's bill, or at least the service of process, gives the complainant a lien upon the property of the judgment debtor, by placing it under the control of the court; which will not suffer it to be withdrawn, so as to defeat the object of the bill by any subsequent act or title. And, land of the debtor, sold after this lien attaches, will be taken by the buyer as a *lis pendens* purchaser, subject to the lien of the complainant.⁶

¹ *Hoffman v. Shields*, 4 W. Va. 490.

² *Fellows v. Fellows*, 4 Cowen, 682.

³ *Boyd v. Hoyt*, 5 Paige Ch. 65, 77.

⁴ *Stafford v. Mott*, 3 Paige Ch. 100.

⁵ 2 Barb. Ch. Pr. 156.

⁶ *Brown v. Ricketts*, 3 Johns. Ch. R. 553.

⁶ *Newdigate v. Lee*, 9 Dana, 17, 20;

2 Barb. Ch. Pr. 157, 158; *Roberts v.*

R. R. Co., 25 Barb. 662; *Bank v.*

Gage, 93 Ill. 172; *Storm v. Waddell*,

2 Sandf. Ch. R. 494; *Brown v. Nich-*

ols, 42 N. Y. 26.

The judgment creditor who first institutes a suit obtains a priority over the creditors in relation to the property and effects of the defendant, which can not be reached by execution at law.¹ This lien is not obtained by the return of an execution unsatisfied, but by the commencement of a suit of this nature founded upon such return.²

The mere filing of a bill without issuing process thereon does not create a lien. To obtain a preference as to the equitable assets of the debtor, the creditor must follow up the filing of his bill by the service of his process, with all due diligence. Therefore, where there were three separate bills filed against a judgment debtor, at different times, and process was first served in the third suit, upon a reference as to priority of claim it was held that the complainant in the third suit was entitled to be first paid out of the fund in the hands of the receiver.³

Several bills filed by creditors of the same estate, to subject it to their debts may be consolidated.⁴

The filing of a creditor's bill operates as an attachment of property which can not be levied on at law. It gives to the vigilant creditor a right to priority in payment; and the creditor who files the second bill will have the second lien.⁵ The lien is confined, however, to the choses in action and equitable assets of the judgment debtor, and does not attach upon his personal property tangible by execution.⁶

An assignment of his property by the defendant, after the filing of a creditor's bill, will not divest the lien of the judgment creditor.⁷ It will only convey the property to the assignee subject to the lien which has thus attached.⁸

¹ *McCalmon v. Lawrence*, 1 Blatchf. C. C. R. 232; *Lyon v. Robins*, 46 Ill. 276; *Corning v. White*, 2 Paige Ch. R. 567; *Bank v. Schermerhorn*, 1 Clarke, 297; *Boynton v. Rawson*, Id. 584; *Gorden v. Lowell*, 21 Maine, 251; *Lucas v. Atwood*, 2 Stewart, 378; *Cole v. Marple*, 93 Ill. 53; *Rappleye v. Bank*, 93 Ill. 396; *Smith v. Lind*, 29 Ill. 20.

² *Edmeston v. Lyde*, 1 Paige Ch. 637; *Wakeman v. Grover*, 4 Paige Ch. 23.

³ *Boynton v. Rawson*, 1 Clarke,

584; *Burrell v. Leslie*, 6 Paige Ch. R. 445; see *Commack v. Johnson*, 1 Green Ch. 163.

⁴ *Campbell's Case*, 2 Bland, 209; see *Claiborne v. Gross*, 7 Leigh, 331.

⁵ *Corning v. White*, 2 Paige Ch. 563; *Rappleye v. Bank*, 93 Ill. 396.

⁶ *Bank v. Schermerhorn*, 1 Clarke, 297; *Edmeston v. Lyde*, 1 Paige Ch. 637; *Eager v. Price*, 2 Paige Ch. 333.

⁷ *Edmeston v. Lyde*, 1 Paige Ch. 637.

⁸ *Corning v. White*, 2 Paige, Ch. 567.

A vendee, whose purchase is fraudulent as to creditors having paid off a prior incumbrance, and the sale having been subsequently set aside, on a creditor's bill, can not recover back the money paid to the incumbrancer; the payment not having been made under a mistake of fact, but a mistake of law.¹

SECTION V.

FRAME OF BILL.

A creditor's bill should state the rendition of the judgment, the court and term in which it was recovered, the nature of the action, the names of the parties, and the amount of damages and costs, or debt and damages.

The bill must also aver the issuing of an execution upon the judgment;² the amount for which it was issued, the direction to the sheriff and its delivery to him. The bill must show that an execution was issued to the county in which the defendant resided at the time it was issued; or state some sufficient legal excuse for issuing the execution to a different county.³

The bill must also show the time when the execution was returnable, and the actual return of the sheriff thereon;⁴ and that it was returned unsatisfied in whole or in part.⁵

The bill must charge that the defendant has some property or equitable interests or things in action which ought to be applied to the complainant's judgment.

If a creditor's bill is filed by an assignee of the judgment, he should, of course, state the assignment to him. But he need not state the consideration of the assignment.⁶

A bill against one of several debtors in a joint judgment for satisfaction thereof, must negative all right of set-off in

¹ *R. R. Co. v. Soutter*, 13 Wallace, 517; see *Ex parte Dunham*, 29 Leg. Int. 389.

² *Cassidy v. Meacham*, 3 Paige Ch. 311.

³ *Reed v. Wheaton*, 7 Paige Ch. 663; *Wilbur v. Collier*, 1 Clark, 315.

⁴ *Cassidy v. Meacham*, 3 Paige

Ch. 311; see *Mitchell v. Byrns*, 67 Ill. 522.

⁵ *Pardee v. De Gala*, 7 Paige Ch. 132; see *Ishmeal v. Parker*, 13 Ill. 324; *Newman v. Willetts*, 52 Ill. 98.

⁶ *Gleason v. Gage*, 7 Paige Ch. 121.

any of the judgment debtors;' and must show that there is no collusion with the defendants, or either of them.²

A judgment creditor may demand from his debtor a disclosure of his assets, and of the names of his creditors in general terms.³

A creditor's bill praying discovery, a receiver, and satisfaction out of the equitable assets of the defendant, need not point out the property sought to be reached.⁴

Chancery Rule 30 provides that a creditor's bill, to reach equitable interests of a debtor, shall show the true sum actually and equitably due the complainant on his judgment or decree, over and above all just claims of the debtor by way of offset or otherwise, and that the debtor has equitable interests exceeding one hundred dollars in value, which the complainant is unable to discover and reach by execution, which has been duly issued and returned unsatisfied, and that the bill is not exhibited by collusion with the defendant, or for the purpose of protecting the property or effects of the debtor against the claims of other creditors, but for the sole purpose of compelling payment and satisfaction of the complainant's own debt.

Bill in aid of execution.—The bill need only allege the issue of an execution, and need not allege its return, nor even the insolvency of the judgment debtor.⁵

Where a creditor seeks to set aside a fraudulent conveyance, he must first secure his lien by a levy of his execution,⁶ and, filing his bill proceed to decree. He must allege that the conveyance was made for the express purpose of delaying and defrauding his creditors.⁷ The allegations of the bill must all be clear and unequivocal.

A creditor's bill in aid of an execution to set aside a deed as in fraud of his rights should aver that the sheriff had levied on the land before the bill was filed; otherwise it would be bad on demurrer; but it may be amended at the hearing.⁸

¹ *Van Cleef v. Sickles*, 2 Edw. Ch. 392.

² *Conant v. Sparks*, 3 Edw. Ch. 104.

³ *Miers v. Turnpike Co.*, 11 Ohio, 273; *Cadwalader v. Society*, Id. 292.

⁴ *Dutton v. Thomas*, 97 Mich. 93.

⁵ *Gibbons v. Pemberton*, 101 Mich. 399; see *Dunsback v. Collar*, 95 Mich. 611.

⁶ *McKibber v. Barton*, 1 Mich. 212; *Fox v. Willis*, 1 Mich. 322; *Eslow v. Mitchell*, 26 Mich. 500; *Glynn v. Phetteplace*, 26 Mich. 383; *Millar v. Babcock*, 29 Mich. 526; *Wets v. Tierman*, 91 Ill. 27.

⁷ *Robinson v. Boyd*, 17 Mich. 128.

⁸ *Krotik v. Bulkley*, 58 Mich. 467; How. Stat. § 6612.

A sheriff holding an execution, can not file a bill in aid of an execution, or to enforce a claim on property, the legal title to which has been transferred by the execution debtor before a levy. If any party files such a bill, it must be done by the creditor or by some person who is legally authorized to do so in his behalf.¹

Prayer.—The bill contains the usual prayer for process, and that the defendant may answer and discover; and in addition, a prayer for injunction and a receiver.

Verification.—Every such creditor's bill shall be verified by the oath of the complainant, or in case of his absence from the State, or other sufficient cause shown, by the oath of his agent or attorney.² When a bill is verified, under this rule, by the complainant's agent, who is not his solicitor, the jurat should state the person verifying to be the agent of the complainant; but where it is verified by the oath of the complainant's solicitor, the court will take notice of that fact from the record and proceedings of the cause.³ If an injunction or receiver is applied for, the bill must be sworn to positively.⁴ A bill in aid of execution need not be sworn to.⁵

Amendment of bill.—Creditors' bills may be amended of course, in the same manner as bills not sworn to,⁶ if the amendments are merely in addition to, and not inconsistent with, what is contained in the original bill,⁷ but all such amendments must be verified by oath, in the same manner as the bill is required to be verified.⁸

No. 175. Consent that bill be taken as confessed.

STATE OF MICHIGAN.

The Circuit Court for the County of ——. In Chancery.

A B,	}
Complainant,	
vs.	
C D,	}
Defendant.	

I, C D, the defendant in the above entitled cause, having caused my appearance in said cause to be entered, do hereby consent, that an order

¹ *Howard v. Ryneearson*, 50 Mich. 307; see *Hill v. Bowman*, 35 Mich. 191; *Jordon v. White*, 38 Mich. 254.

² Chan. Rules 30c and 2a.

³ *Bergh v. Poupard*, Walk. Ch. 5.

⁴ 2 Barb. Ch. Pr. 165; *Sizer v. Miller*, 9 Paige Ch. R. 605.

⁵ *Moore v. Chieseman*, 23 Mich. 335.

⁶ *Ante*, page 125.

⁷ Chan. Rule, 16c.

⁸ *Ibid*.

may be entered in said cause, taking the bill filed therein as confessed, and for the appointment of a receiver in said suit, and for a reference of said cause to a commissioner, to take my examination, as such commissioner shall direct, in relation to any matter which I might have been legally required to disclose if I had answered the bill of complaint in the usual manner.

Dated, etc.

C D,
Defendant.

Proceedings.—Chancery Rule 30, provides that the proceedings in a suit on a creditor's bill shall, except as otherwise provided by rule or statute, be governed by the general chancery rules.

Defendant required to answer.—When the complainant in a creditor's bill shall have a right by statute to a discovery and disclosure of facts from the defendant, the defendant shall in his answer fully and explicitly set forth the particular facts called for. If he fail to do so, the complainant may have his right to further answer and disclosure determined by the court on special motion, and the court may enforce its order thereon by the attachment of the defendant, and may strike such insufficient answer from the files.¹

SECTION VI.

RECEIVERS IN CREDITOR'S SUITS.

May be appointed.—Chancery Rule 30 provides that the court may appoint a receiver in a suit upon a creditor's bill pending the determination of the suit, when it shall be deemed necessary for the protection of the rights of the complainant.

Their powers.—Every receiver of the property and effects of the debtor, appointed in a suit upon a creditor's bill, shall, unless restricted by the special order of the court or circuit court commissioner, have general power and authority to sue for and collect all the debts, demands and rents belonging to such debtor, and to compromise and settle such as are unsafe and of a doubtful character. He may also sue in the name of the debtor, where it is necessary or proper for him to do so, and he may apply for and obtain an order of course, that the

¹ Chan. Rule 30b.

tenants of any real estate belonging to the debtor, or of which he is entitled to the rents and profits, attorn to such receiver and pay their rents to him. He shall also be permitted to make leases from time to time as may be necessary, for terms not exceeding one year. And it shall be his duty, without unreasonable delay, to convert all the personal estate and effects into money; but he shall not sell any real estate of the debtor without the special order of the court. He is not to be allowed for the costs of any suit brought by him against an insolvent from whom he is unable to collect his costs, unless such suit is brought by order of the court, or by the consent of all persons interested in the funds in his hands. But he may sell such desperate debts and all other doubtful claims to personal property at public auction, giving at least ten days' notice of the time and place of such sale.¹

Receivers for several suits.—Where several bills are filed by different creditors against the same debtor, no more than one receiver of his property and effects shall be appointed, unless the first appointment has been obtained by fraud or collusion, or unless the receiver is an improper person to execute the trust.²

Security by receiver.—The receiver shall give security sufficient to cover the whole property and effects of the debtor, which may come in his hands by virtue of his office; and he shall hold the property and effects of the debtor for the benefit of all creditors who have commenced, or shall commence, similar suits during the continuance of his trust, to be disposed of according to their legal or equitable priorities.³

How to pay over money.—The receiver shall not pay over the money in his hands to the parties, or to any other person, without being especially authorized to do so by an order or decree of the court; nor shall he be discharged from his trust without a special order, to be obtained upon a written consent of all the parties interested in the property in his hands, or upon notice of the application.⁴

Receivers for subsequent suits.—When another suit is commenced after the appointment of a receiver, the same per-

¹ Chancery Rule 31*a*.

² Chancery Rule 31*b*.

³ Chancery Rule 31*b*.

⁴ Chancery Rule 31*b*.

son may be appointed receiver of such subsequent suit, and give such further security as the court shall direct.¹

Receiver's accounts.—The receiver must keep a separate account of any property or effects of the debtor, which may have been acquired since the commencement of the first suit, or which may be assigned to such receiver under the appointment in the last cause.²

May be appointed in vacation.—The court has power to appoint receivers in vacation as well as during the session of the court.³ The application may be made to the circuit judge at chambers.⁴

No. 176. Creditor's bill.

STATE OF MICHIGAN.

The Circuit Court for the County of ——. In Chancery.

To the Circuit Court for the County of ——. In Chancery.

1. Your orators, A B, E F, and G H, of, etc., partners under the name and style of B F & Co., respectfully represent unto this honorable court, that at the — term, 18—, of the — court of said county, and on, etc., being one of the regular days of said term, your orators recovered a judgment against one C D, one of the defendants hereinafter named, for the sum of — dollars *damages* and the costs of suit, whereof the said C D stands convicted; as by the record of the said judgment in the office of the clerk of said court, reference being thereto had, will more fully appear.

2. Your orators further represent, that the said judgment remaining in full force and effect, and the damages aforesaid unsatisfied, your orators, on, etc., for the purpose of obtaining satisfaction of the said judgment, sued and prosecuted out of the said court, a writ of *fieri facias*, directed to the sheriff of the county of —, that being the county in which the defendant, C D, resided at the time of the issuing of said writ; by which said writ the said sheriff was commanded, that of the goods, chattels, lands and tenements of the defendant, C D, in his county, he should cause to be made the said sum of — dollars, which your orators in the said — court recovered against the said C D, and that he should have the money at the clerk's office of said court, at —, in said county, in ninety days from the date thereof, to satisfy the judgment so recovered by your orators as aforesaid, and that he should have then and there that writ.

3. And your orators further represent, that the said writ of *fieri facias*, before the delivery thereof, was duly indorsed, and was afterward, on, etc., delivered to the said sheriff, to be by him executed in due form of law.

4. And your orators further represent, that the said sheriff, on, etc., made a return of said writ with an indorsement thereon, that, etc. (*Here*

¹ Chancery Rule 31c.

² Chancery Rule 31c.

³ Comp. L. 1871, § 5070. How. St. § 6624.

⁴ Comp. L. 1871, § 5071. How. St. § 6625.

insert the return of the sheriff); as by the said writ of *feri facias*, and the sheriff's return as aforesaid, now on file in the office of the clerk of the said court, will more fully appear.

5. And your orators further represent, that the said judgment still remains in full force and effect, not reversed, satisfied or otherwise vacated; that there is now actually and equitably due your orators upon the same, the sum of — dollars, together with interest thereon from the date of the rendition thereof, over and above all claims of the defendant C D by way of set-off, or otherwise.

6. And your orators further represent, that at the time of the recovery of the said judgment against the defendant C D, he, the said C D, was, and for several years previous thereto had been, engaged in the mercantile business at the — of —; and your orators are informed and believe that in the course of the said mercantile business of the said C D, divers persons became indebted to him to a large amount, and that the defendant C D has, at the time of filing this your orator's bill of complaint, debts due to him, and for which he holds divers securities and evidences, to a large amount, and has divers goods, wares and merchandise, or other articles of personal property which belong to him, or in which he is in some way or manner beneficially interested, and that he has equitable interests and things in action of some nature or kind, which might and ought to be applied to the payment of your orators' said judgment against him, the defendant C D.

7. And your orators further represent that the defendant C D is the owner of, or in some way or manner beneficially interested in, some real estate, in this or some other State or Territory, or of some chattels real or of some name or kind, or some contract or agreement relating to real estate, or the rents, issues and profits of some real estate; and also that the defendant C D is the owner of, or in some way or manner beneficially interested in the stock of some company, incorporated or unincorporated, or in the profits of some company or copartnership; and also that he has in his possession, at the time of the filing of this your orator's bill of complaint, some money in coin, or bank bills, or that he has money deposited in some bank or elsewhere, to his credit; or that he has money or securities for the payment of money, held by some other person in trust or otherwise for his benefit.

8. And if the defendant C D has made any sale, transfer or assignment of his property or effects, or any part thereof, your orators expressly charge that they believe such sale, transfer or assignment is merely colorable, and made with a view of protecting the property or effects of the defendant C D so assigned, and placing the same beyond the reach of your orators' said judgment, and enabling the defendant C D to control and enjoy the same, and the avails thereof; and that it would so appear, if the defendant C D would state and set forth when and to whom such sale, transfer or assignment was made, and what was the amount in value of the property or effects so assigned, sold or transferred, and what were the terms and conditions upon which such sale, transfer or assignment was made, and what disposition has been made of the property or effects so sold, transferred or assigned, and in whose possession the same now is, or what has been done with the avails thereof.

9. And your orators claim a full and complete discovery of all such property, effects and things in action, belonging to the defendant C D, and of all trusts whereby any property, debts or other effects are held for the use or benefit of the defendant C D, and of every sale, transfer or assignment which the defendant C D has made of his property, debts or other effects, and of the person or persons to whom such an assignment, sale or transfer has been made, the amount and value of the property, debts or other effects so assigned, sold or transferred, and the trusts or other conditions upon which such sale, assignment or transfer was made, and all the facts and circumstances relating thereto; and particularly what is the situation of the property, debts or other effects assigned or transferred, at the time of filing this your orators' bill of complaint.

10. And your orators further represent, that they have reason to believe, and do believe, and so charge the fact to be, that the defendant C D has property, debts, and other equitable interests, things in action or effects, of the value of more than — dollars, exclusive of all prior just claims thereon, and which your orators have been unable to reach by execution on said judgment against the defendant C D; and that this your orators' bill of complaint is not exhibited by collusion with the defendant C D, or with any other person, or for the purpose of protecting the property or effects of the defendant C D against the claim of other creditors, but for the sole and only purpose of compelling payment and satisfaction of the judgment so as aforesaid recovered by your orators against the defendant C D.

11. And your orators further represent, that they are informed and believe, and so state the fact to be, that L M, N O, P Q, and R S, of, etc., other parties defendants, hereinafter named, or some one or more of them, have in their possession or control, divers goods, wares and merchandise, and other articles of personal property, which belong to the defendant C D, or in which the defendant C D is in some way or manner beneficially interested; or that they or some of them have in their possession or under their control, some money, stock, bonds, promissory notes, bills of exchange, judgments, mortgages, deeds of trust, books of account, debts, evidences of indebtedness or other choses in action, which they or some of them hold in trust or otherwise for the use and benefit of the said C D, or in which he is in some way or manner beneficially or otherwise interested; or that they or some of them hold in trust or otherwise, for the defendant C D, some real estate in this or some other State or Territory; or some chattels real of some kind; or some contract or agreement relating to real estate; or the rents, issues and profits of some real estate; or some stock of some company, incorporated or unincorporated; in trust for, or in which the defendant C D is in some way or manner beneficially or otherwise interested; and that it would so appear, if the defendants last named would, each for himself, state and set forth everything according to the best of their knowledge, information and belief, relating to any and all such property, real and personal effects, choses in action, etc., and how, and upon what terms and conditions, and for what purpose, the same is so held by them, and all the facts and circumstances relating thereto. And your orators claim a full and complete discovery of all such property, effects and things in action,

held or controlled by the said last named defendants, or by any or either of them, in trust or otherwise, for the benefit of the defendant C D.

12. And that each of the said last named defendants shall set forth and state the nature and description of any property, effects, and choses in action, the amount, kind, value and particulars thereof, and the precise terms and conditions upon which the same are so held and controlled by them. or any or either of them.

(Here insert such other charges as the nature of the case may seem to require, and if any other persons are supposed to have property, etc., in their possession or under their control in which the defendant is interested, charge the facts. and make them parties.)

13. And your orators well hoped, that the defendant C D would have paid to your orators the amount due to them on their said judgment, or would have applied for that purpose any property, money, debts, or other equitable interests or things in action belonging to him, or in which he is in any way interested, as in equity and good conscience he ought to have done.

14. But now so it is, the defendant combining and confederating with divers other persons, to your orators unknown, but whose names, when discovered, they pray may be inserted herein, with proper and apt words to charge them, and contriving how to injure and defraud your orators, in the premises, neglects and refuses to pay the amounts so due to your orators, on their said judgment, or to apply for that purpose any property, money, debts or other equitable interests or things in action, belonging to the defendant C D; and for reason whereof the defendant C D sets up a variety of unfounded pretenses. All which actings, doings, neglects and pretenses are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orators in the premises.

Forasmuch, therefore, as your orators are without remedy in the premises, except in a court of equity, your orator prays:

I. That the said C D, L M, N O, P Q and R S, who are made parties defendant to this bill, may be required upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, to full, true, direct and perfect answer make, to all and singular, the matters and things hereinbefore stated and charged as fully and particularly as if the same were here again repeated and they severally thereto distinctly interrogated, paragraph by paragraph, and especially that they may each set forth and discover the nature and situation, amount and value of all the property, interests and effects of the defendant C D, including all things in action, of whatever nature or kind, with all the particulars relating thereto, and that they may severally and respectively answer and state whether at the time of filing this your orators' bill of complaint, the defendant C D has not debts due to him to a considerable amount; and if so, that they state particularly the amount of such debts respectively, and from whom the same are due, and what securities are held therefor, and also which and what amount of said debts are good and collectible, and which and what amount bad and doubtful; and whether at the time of filing this, your orators' bill of complaint, the defendant C D had not or has not now some property, real or personal, in

law or equity, belonging to him, or held in trust for him, or in which he had some beneficial interest of some kind or description, and if so, that they may severally state and set forth a full, true and particular account thereof, and the nature and value of his interest therein.

II. That they may also severally state whether the defendant C D has not money of some kind in his possession, or under his control, or deposited to his credit or for his use, or in some way or manner held for his benefit, and if so, that the defendants may respectively state and set forth particularly the amount thereof, and how and by whom the same is held;

III. That the defendants may severally state whether the defendant C D has any other equitable interests or things in action, or other means belonging to him, or in which he is in any way interested, whereby he could pay any part of the amount so, as aforesaid, due to your orators upon their said judgment against the defendant C D;

IV. And if the defendant C D has made any sale, assignment or transfer of his property and effects, or any part thereof, that then the defendants may severally and respectively state and set forth generally, but not in items, what property or effects have been so sold, assigned or transferred, and the value thereof, and particularly when, and to whom, and for what purpose, and upon what terms and conditions, such sale, assignment and transfer was made, and what has been done under such sale, assignment or transfer, and what has been done with the property or effects so sold, assigned or transferred, and the avails thereof;

V. And that the defendants may also severally answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written, they are respectively required to answer; that is to say :

a. Whether, etc., etc.

b. Whether, etc.

c. Whether at the time of the filing of this bill of complaint you had, or have now, in your possession, custody or charge, any lands, tenements, goods, chattels, moneys, bonds, promissory notes, bills of exchange, judgments, mortgages, deeds of trust, stocks, choses in action, credits or effects of any kind or nature belonging to the defendant C D, or in which he is in any manner directly or indirectly, beneficially or otherwise, interested? If yea, set forth fully and particularly the kind, number, quantity and value thereof respectively; and state fully the terms and conditions upon which the same are so held.

d. Were you at or after the time of the filing of this bill of complaint, or are you now, in any manner indebted to the said C D? If yea, set forth fully and particularly for what, how and to what amount you were or are so indebted to him.

e. Whether, etc.

VI. And that the defendant C D may be decreed to pay your orators the amount so as aforesaid due to them for principal and interest on their said judgment, together with your orators' costs and charges in this behalf sustained; and may be decreed to apply for that purpose any money or property real or personal, in law or equity, debts, choses in action or equitable interests belonging to him, or held in trust for him, or in which he is in any way or manner beneficially interested;

VII. That the defendant C D may be enjoined and restrained from selling, assigning, transferring, delivering, negotiating, discharging, receiving, collecting, incumbering, or in any way or manner disposing of, or intermeddling with, any debts or demands due to him, or any bills, bonds, notes, drafts, checks, book accounts, mortgages, judgments, or other debts due to him, whether in his possession or held by some other person in trust for him, or to his use and benefit: and also from assigning, transferring, or in any manner incumbering or disposing of, or intermeddling with, any money in coin, bank bills, drafts or checks belonging to him, whether in his possession, or held by any other person in trust for his use or benefit; or any stock, or interest in any private or incorporated company, or any property, real or personal, things in action or chattels real, held by him, or by any other person for him, or in which he has any interest whatever, except where such trust has been created by, or the fund so held in trust has proceeded from some person other than the defendant C D.

VIII. That the defendant C D may also be in like manner prohibited from making any assignment of his property, and from confessing any judgment for the purpose of giving preference to any other creditor over your orators, and from doing any other act to enable other creditors to obtain his property.

IX. That a receiver may be appointed, according to the course of practice of this court, and with the usual powers of receivers in like cases, of all the property, equitable interest, things in action, and effects of the defendant C D.

X. And that your orators may have such other and further relief in the premises as equity may require and to this honorable court shall seem meet.

(Add prayer for injunction according to prayer of bill; also prayer for process.)

STATE OF MICHIGAN, }
County of ——— } ss.

A B, on oath states that he is one of the complainants in the foregoing bill named, and has heard the same read, and knows the contents thereof. That the matters and things in the said bill contained are true of his own knowledge, except as to those matters which are therein stated to be on his information and belief, and as to those matters he believes it to be true.

NOTE.—The defendants are each required to answer the interrogatories a, b, c, d, e, etc., in the foregoing bill of complaint. The defendant C D is required to answer all of said interrogatories except c and d.

— — —,
Sol. for complainants.

No. 177. Bill in aid of an execution to remove a fraudulent conveyance.

STATE OF MICHIGAN.

The Circuit Court for the County of ———. In Chancery.

To the Circuit Court for the County of ———. In Chancery.

1. Your orator, A B, of, etc., respectfully represents unto this honorable court, that on, etc., your orator recovered a judgment in the — court, of the county of —, in this State, against one C D, one of the defendants

hereinafter named, for the sum of — dollars, damages, and the costs of that suit, whereof the said C D stands convicted, as by the record of the said judgment in the office of the clerk of the said court, reference thereto being had, will more fully appear.

2. Your orator further represents that, previous to the time of the rendition of the said judgment, the defendant C D was the owner in fee simple of the following described real estate, to wit: (*Here insert description.*)

3. Your orator further represents, that on, etc., the said judgment remaining in full force and effect, and the damages and costs aforesaid unsatisfied, your orator, for the purpose of obtaining satisfaction of the same, caused a writ of *fiery facias* to be issued and delivered to the sheriff of the said county of —, where the defendant C D then resided, and still resides, and the said real estate is situated, in the usual form, commanding the said sheriff that of the goods, chattels, lands and tenements of the defendant C D in his county, he should cause to be made the said sum of — dollars, which your orator in the said — court recovered against the said C D, and he should have the money at the clerk's office of said court, at —, in said county, in —, ninety days from the date thereof, to satisfy the judgment so recovered by your orator as aforesaid, and that he should have then and there that writ; which said writ of *fiery facias* was duly indorsed, and on the same day delivered to the said sheriff, to be by him executed in due form of law.

4. And your orator further represents that said sheriff on, etc., duly levied said execution upon the said above described real estate. -

5. Your orator further represents that prior to the rendition of the said judgment, but after the indebtedness upon which the same was rendered had accrued, to wit, on, etc., the defendant C D made a pretended conveyance in fee of the said described real estate to one G H, another defendant hereinafter named, for a pretended consideration of — dollars.

6. And your orator further represents, that the said conveyance was not real, but was a mere sham, and made with the intention of defrauding your orator, and the other creditors of the said C D, out of their just demands; that no consideration was paid by the said G H to the said C D for the said conveyance; and that the said premises are now held by the said G H in trust for the said C D, and for his use and benefit, and for the purpose of preventing a levy and sale of the same under and by virtue of said execution.

7. Your orator further represents, that the said G H is a man of no pecuniary responsibility, and is possessed of little or no property other than that so fraudulently conveyed to him as aforesaid, and is in embarrassed circumstances, and involved and largely in debt.

8. Your orator further represents, that the said C D has no personal or real estate liable to levy and sale, except the premises aforesaid, on which the said sheriff could make a levy and realize the amount of the said judgment and costs; and that, although the said sheriff has frequently demanded of the said C D to pay the amount due upon the said judgment, or that he turn out property upon which he could make a levy, the said C D has refused to pay the same, or turn out property, and fraudulently insists that he has neither money nor property to satisfy the same.

9. Your orator further represents, that the said judgment still remains

in full force and effect, not reversed, satisfied or otherwise vacated; that there is now actually and equitably due your orator upon the same the sum of ——— dollars, together with interest thereon from the date of the entry of the said judgment, over and above all claims of the said C D by way of set-off or otherwise.

Forasmuch, therefore, as your orator is without remedy in the premises, except in a court of equity, your orator prays:

I. That the said C D and G H, who are made parties defendant to this bill, may be required upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, to full, true, direct and perfect answer make to all and singular the matters and things hereinbefore stated and charged, as fully and particularly as if the same were here again repeated and they severally thereto interrogated, and especially that they may each set forth and state the facts and circumstances attending the said conveyance, the amount of money actually paid thereon by the said G H to the said C D, and how and in what manner the payments were, or were to be made, from whence the said G H derived the funds with which to make said purchase, and the purpose of said conveyance; and that the defendants may also severally answer make to such of the several interrogatories hereinafter numbered, as by the note hereunder written, they are respectively required to answer, that is to say:

a. Whether, etc. (*Here insert as many interrogatories as may be deemed necessary.*)

II. And that upon the hearing thereof, the said conveyance, including the deed thereof, as to the complainant, be set aside, vacated and declared null and void;

III. That an injunction be allowed, restraining the said defendants, or either of them, from disposing of, transferring, incumbering, or in any manner interfering with the said property, or any part thereof;

IV. That a receiver be appointed, with the usual powers and duties of a receiver;

V. That the complainant may be authorized to proceed upon his said writ of *fiery facias* issued as aforesaid, or issue another writ thereon, as it may be deemed necessary;

VI. That the sheriff of said county thereupon be directed to proceed to levy upon, advertise and sell said premises for the payment and satisfaction of your orator's said judgment, interest and costs;

VII. That your orator may have such other and further relief in the premises as equity may require, and to this honorable court shall seem meet.

May it please, etc. (*Pray process, and for an injunction, and add affidavit and note, as in the last form— No. 176.*)

No. 178. Bill by creditor against executrix of a deceased debtor.

STATE OF MICHIGAN.

The Circuit Court for the County of ———. In Chancery.
To the Circuit Court for the County of ———. In Chancery.

1. Your orator, A B, of, etc., for and on behalf of himself and all other creditors of C D, late of, etc., deceased, who shall come in and contribute

to the expense of this suit, respectfully represents unto this honorable court, that the said C D, deceased, was in his lifetime, and at the time of his decease, indebted to your orator in the sum of — dollars, for and on account of, etc. (*Here state the nature of the indebtedness*), which said sum of — dollars still remains due and owing to your orator.

2. And your orator further represents, that the said C D was also at the time of his decease, as it is alleged, indebted to certain other persons by specialty, simple contract or otherwise. And that the said C D being so indebted, and being possessed of, or well entitled to, considerable real and personal estate, departed this life on or about the — day of —, 18—, having first duly made and published his last will and testament in writing, bearing date, etc., and thereby gave and bequeathed all his estate and effects in the words and manner following, that is to say: "I give and bequeath unto my dear wife, E D, all my estate, real and personal, and effects whatsoever, and wheresoever absolutely. And I appoint my said wife executrix of this my last will and testament, and I revoke all other wills by me heretofore made. It is my will that letters testamentary issue to my said wife without it being required of her to enter into bond with security as such executrix." And your orator further represents, that the said testator departed this life without having revoked or altered his said will, and that immediately after his decease the said E D possessed herself of a considerable part of his personal estate and effects, and converted the same to her own use, and entered into possession of his real estate and receipt of the rents and profits thereof. And that afterward, on, etc., the said E D duly proved the said last will and testament in the — court of the county of — aforesaid, and letters testamentary were granted to her by said court, without requiring her to enter into bond with a good and sufficient security conditioned according to law, and she took upon herself the burden of the execution thereof.

3. And your orator further represents, that afterward, on, etc., your orator presented his said claim before the said — court, and the same was then and there duly probated and allowed to the said amount of — dollars, by that court, as a claim against the estate of the said C D, deceased, as a debt of the — class.

4. Your orator further represents, that the said E D, immediately after the proving of the said will, and the issuing of the letters testamentary as aforesaid, possessed herself of the residue of the estate and effects of the said testator, to a very considerable amount and value, and, together with the effects of the said testator so possessed and converted to her use before that time, as aforesaid, much more than sufficient to discharge and satisfy all his just debts, funeral and testamentary expenses, but that the said E D has not yet paid or satisfied the debt due to your orator, or any part thereof, and the same, together with some other of the debts owing by the said C D, at the time of his decease, still remain unsatisfied. And the said E D, having as aforesaid possessed assets of the said C D, much more than sufficient to satisfy all his debts, your orator has applied to and requested the said E D to satisfy the same accordingly. And your orator well hoped that the said E D, would have complied with such request, as in justice and equity she ought to have done. But now so it is, may it please your honor, that the said E D, combining and confederating with divers other persons

at present unknown to your orator, etc., refuses to pay the debt of your orator, and alleges that the personal estate and effects of which the said C D, deceased, was possessed, or entitled to, at the time of his decease, and which have come to her hands, or to the hands of any person or persons by her order, or for her use, was small and inconsiderable, and has already been exhausted in the payment of his funeral expenses, and debts of a class superior and prior to that of your orator, and other creditors having claims of a similar class; and that nothing now remains in her hands of the assets of the said C D, deceased, with which to pay such unsatisfied debts; and she wholly refuses to sell the said real estate or any part thereof, for the purpose of paying the said debts from the proceeds thereof; and refuses to apply the rents and profits of the said real estate, to the payment of said demands, but applies and converts the same to her own use, and refuses in any manner to account for the same, and insists that she is now the absolute owner of all such real estate, and the personal property now in her hands; whereas, your orator charges that the contrary of such pretenses is true, and that upon a fair accounting with respect to said estate, a sufficient sum would appear to be in the hands of the said E D to satisfy all said debts.

Forasmuch, therefore, as your orator is without remedy in the premises, except in a court of equity, your orator prays:

I. That the said E D, who is made a party defendant to this bill, may be required to make full and direct answer to the same; and especially that she may set forth and discover the nature, amount and value of all the property, real and personal, interests and effects of the said C D, deceased, of whatever nature and kind, with all the particulars relating thereto, owned by the said C D at the time of his death, and which came into the possession or control of the defendant, or into the possession of any other person or persons for her use, and what has been done with the same or the avails thereof; and that the defendant may answer make to the several interrogatories hereinafter set forth, that is to say:

a. Whether you, the said E D, did not, soon after the death of the said C D, take possession of a considerable portion of the personal property and effects of the said C D, and convert the same to your own use? If yea, give the nature, amount and value of the same, and state what has been done with the proceeds or avails thereof.

b. Whether, etc. (*and so on, inserting such interrogatories as may be deemed necessary*).

II. That an account may be taken by and under the direction of this honorable court of the real and personal estate of the said C D, deceased, and of the debt due your orator, and of the debts due to the other creditors of the said C D remaining unsatisfied at the time of his decease, and of the rents and profits of his real estate, which have been possessed by, or come to the hands of, the defendant, or of any person or persons by her order or for her use;

III. That the real and personal estate of the said C D, or so much thereof as remains unapplied and undisposed of may be applied, in the first place, in or towards the satisfaction of his funeral expenses, in case the same have not been satisfied, and then, etc. (*as required by law in reference to prefer-*

ence); then in satisfaction of the debt due to your orator, and the other creditors of the same class, who shall come in in like manner and contribute to the expense of this suit equally, and share alike in due course of administration;

IV. That a receiver may be appointed by this honorable court to collect in and receive the outstanding personal estate and effects belonging to the said C D, and the rents and profits of his real estate;

V. That the defendant may be restrained, by the injunction of this honorable court, from receiving the rents and profits of his real estate, and from collecting in and receiving any such outstanding personal estate, and from assigning, selling, or parting with any part of the personal estate and effects of or belonging to the said C D, now in the custody or power of the said defendant, or in the custody, possession or power of any person or persons in trust for her;

VI. And that your orator may have such other and further relief in the premises as equity may require, and to this honorable court shall seem meet.

May it please, etc. (*Pray process and for injunction.*)

No. 179. Order appointing a receiver in a creditor's suit.

(*Proceed as in No. 102, ante, page 184, to the asterisk *, and continue:*)

It is ordered that E F, of, etc., be and he is hereby appointed receiver of the estate and property, real and personal, things in action, debts, equitable interests and other effects of the defendant, C D, and which belonged to, or were held in trust for him, at the time of the commencement of this suit, or in which he had any beneficial interest, except such property as is by law exempt from execution: and also, except where such trust property has, in good faith, been created by, or the fund so held in trust has proceeded from some person other than the defendant, C D, himself, and of the real estate mentioned and described in the complainant's bill, to wit (*Here describe it*): and the rents, issues, incomes and profits thereof, with the usual powers and duties of receiver, upon the said receiver executing and filing with the clerk of this court a bond in the usual form, to the people of this State, in the penal sum of — dollars, with sureties, to be approved by this court. And it is further ordered that the defendant, C D, do assign, transfer and deliver to said receiver, on oath, under the direction of S O W, a circuit court commissioner, of this court, all such property, real and personal, things in action, equitable interests, and other effects, except as aforesaid, property exempt by law from execution, and trust property, where the trust has been created by, or trust fund proceeded from, some person, in good faith, other than the defendant himself. And that he deliver to said receiver, in like manner, all bills, notes, contracts, books of account, etc., and other evidences relating thereto. And that the defendant, C D, execute and deliver to said receiver, under the direction of the said commissioner, a general assignment of such property and effects; and also execute, acknowledge and deliver to said receiver, under the direction of the said commissioner, a conveyance and assignment of the real estate mentioned in said bill, and hereinbefore described, and of the rents, issues and profits thereof. And that the defendant C D, and his

tenants, etc., attorn to the said receiver, and pay to him the rents and profits, and that the said receiver have power to make leases of such real estate, from time to time, not exceeding one year, as he may deem advisable. And that the defendant appear before the said commissioner, as he shall be summoned or required to do, from time to time, and produce such books, papers and accounts, and submit to such examination, as said commissioner shall direct, in relation to any matter which he may be lawfully required to disclose.

The above order is to be varied to conform to the circumstances of each particular case. If any further special direction or provision is desired, insert it at the end of the form.

No. 180. Order referring creditor's bill to master, to examine defendant and witnesses.

*(Proceed as in No. 102, ante, page 184, to the asterisk *, and proceed.)*

It is ordered that this cause be referred to S O W, a circuit court commissioner of this court, to examine the defendant, C D, and such witnesses as shall be produced before him, under oath, and upon interrogatories concerning the property, chattels, things in action, equitable interests, and effects of the defendant, C D, and to report the same to this court, with all convenient speed; and that the defendant C D do appear and attend from time to time, and when summoned or required so to do, before said commissioner, and produce such books, accounts and papers, and submit to such examination as the said master shall direct, in relation to any matter which he may lawfully be required to disclose; and that the said commissioner, or either party, be at liberty to apply to the court at any time for further directions.

No. 181. Decree that complainant's debt be paid out of funds in the hands of the receiver.

(Caption and title of cause, as in No. 97, ante, page, 179.)

This cause having come on to be heard upon the bill of complaint herein, the answers of the defendants thereto, the replication of the complainant to such answers, and the report of the receiver heretofore appointed in this cause, and the report of the circuit court commissioner, to whom the same was referred to examine the defendant and other witnesses in the cause, which said reports are each hereby approved and confirmed; and this cause having been argued by the counsel for the respective parties; and the court being fully advised in the premises, doth *order, adjudge and decree*, that out of the moneys in the hands of the said receiver, collected and held by him, as shown by his said report, the said receiver, after deducting his charges for disbursements and commissions, do pay the costs of this suit, to be taxed by the register of this court, and out of the residue of said moneys, he pay the complainant the amount of the said judgment, to wit, the sum of — dollars, with interest thereon from the time the said judgment was entered, to wit, the — day of, etc., and that he take from the complainant an acknowledgment of satisfaction of said

judgment, and deliver the same to the defendant C D, to the end that said judgment may be canceled and discharged of record. (*If there is no other claimant upon the fund in the hands of the receiver, add:*)

2. And it is further ordered, adjudged and decreed, that the said receiver do pay over to the defendant C D, the residue of the moneys so remaining in his hands, or account with him for the same, and deliver to him all and singular the property and effects, books of account, evidences of debt, or other papers or documents relating to said trust estate, on demand of the defendant C D; and also, if the defendant C D shall so require, that the said receiver execute back to him a general release and assignment of all and singular the property, equitable interests and effects of said trust estate, remaining in his hands undisposed of. On which assignment and delivery being made, it is adjudged that the said receiver be discharged from his said trust.

If the amount in the receiver's hands is not sufficient to pay the debt and costs, the decree must of course be varied to meet the facts, and will merely direct the receiver to pay the amount so collected upon the judgment, and take the complainant's receipt therefor. If assets, etc., remain undisposed of, the court may direct their sale and application.

If there are other claimants upon the fund, or the receivership has been extended over the property in a subsequent suit, the court, instead of ordering the surplus to be paid over to the defendant, will direct it to be brought into court, to abide its further order.

No. 182. Decree setting aside a fraudulent conveyance in aid of an execution.

(*Caption and title of cause, as in No. 97, ante, page 179.*)

1. This cause coming on to be heard upon the bill of complaint herein, the answers of the defendants thereto, the replication of the complainant to such answers, and the report of the commissioner to whom the same was referred to take proofs of the matters alleged in the bill, which said report is hereby approved and confirmed; and the court having heard the arguments of the counsel of the respective parties, and being fully advised in the premises, doth order, adjudge and decree that the deed of conveyance, bearing date on, etc., made and executed by the defendant C D to G H, for the premises described therein, and in the complainant's bill, to wit: (*Here describe the premises*), be and the same is hereby set aside and vacated and declared null and void, and of no effect whatever, as against the complainant.

2. And it is further ordered, adjudged and decreed, that the complainant be authorized to proceed upon his writ of *fiery facias*, issued upon the judgment rendered in the — court of the county of — aforesaid, described in said bill of complaint, wherein he is plaintiff, and the defendant C D defendant, for — dollars and costs; or issue another writ of *fiery facias* thereon, if it be necessary, and that the sheriff of said county thereupon

proceed to levy upon, advertise and sell said real estate for the payment and satisfaction of the said judgment, interest and costs.

3. And it is further ordered, adjudged and decreed, that the defendant C D pay the costs of this proceeding, to be taxed by the register of this court; and if the proceeds of the sale of the said premises be not sufficient to pay said judgment, interest and costs, and the costs of this suit, that the complainant have further execution for the same against the defendant C D.

On setting aside a voluntary conveyance, as in fraud of creditors, the decree should be an alternative one as to the grantee, that if the judgments are not paid by the time limited, the lands shall be sold, giving the grantee an option to pay the debts. It should not be a personal decree against the grantee.¹

¹ *Patterson v. McKinney*, 97 Ill. 41.

CHAPTER XXXI.

PARTITION SUITS.

- Section 1. NATURE OF, AND HOW INSTITUTED.
2. PARTIES TO.
3. BILL.
4. REFERENCE AND PROCEEDINGS THEREON.
5. PROCEEDINGS TO DECREE.
6. HEARING AND DECREE.

SECTION I.

NATURE OF, AND HOW INSTITUTED.

Partition is the severance of common or undivided interests. It is particularly applied to interests in realty. At common law lands held by two or more persons were held by them either in joint tenancy, in common, or in coparcenary. The first two of these estates were created by the act of the parties. The last was created by operation of the law, when in casting a descent it devolved a single estate upon two or more heirs; as, for example, when an estate in fee of one who left no male succession, passed to his daughters or other female relatives. These persons were called coparceners. Theirs was the only joint estate of which the common law would compel a dissolution at the request of a single party. Joint tenants and tenants in common became so by their own mutual agreement and act, and the tenancy could be justly severed only by their mutual consent. But coparceners are rendered so by operation of law, and lest any one of them be prejudiced by the perverseness of his fellows, the law will lend its aid, if he ask it, and help him by partition, to the enjoyment of his separate interest.

In the reign of Henry VIII (1527), and of William IV (1833), special statutes were passed extending this common law benefit, which hitherto coparceners alone had enjoyed, to joint tenants

and tenants in common, so that partition then became incident to all estates held in common.

In the United States the technical joint tenancy is quite obsolete; joint ownership being, if not under express statute, yet in effect, only tenancies in common. So, also, the technical distinctions between estates in common and in coparcenary have lost nearly all their force. Much, therefore, of "the cunning learning of partition," as it exists in the English law, is inapplicable here. Yet, as among us, real property generally passes, on the death of an ancestor, to more persons than one; partition still retains an importance in respect to the tenancies in common of heirs and devisees.

In some of the States the operation of this remedy is extended by statutes beyond the limits fixed for it by the common law, or the statute of Henry VIII. Partition in England was made either by mutual consent or upon compulsion. In the latter case the relief was sought either by a writ of partition, sued out by one party, at common law, or by his petition to the court of chancery.

If the courts of law ever had exclusive jurisdiction of partition, as it is sometimes asserted, it must have been at a very remote period. For as early as the reign of Elizabeth (1571), it is certain that chancery took cognizance of the matter, and in modern times has exercised an almost exclusive jurisdiction.

There is good reason, in most of the States, for the preference of chancery courts over courts at law, in matters of partition; the proceeding at law being regarded as far less effectual than that in equity. The courts of law are generally limited to a mere allotment, according to the proportional shares of the parties in interest; and this often causes a purely mechanical, and sometimes a prejudicial, division of an estate. Chancery is not restricted to the exact balancing of equivalent shares, but is capable of all equitable adjustments of the matter, and may distribute among the proprietors the separate, though unequal, parcels of the estate, assigning to the several parties the portions which will best suit their respective condition, equalizing such a partition by decreeing pecuniary compensation to be made, or in other cases ordering equitable payments by some for improvements made in the common property of others. This jurisdiction is exercised with peculiar

fitness in all cases where purely equitable rights, conflicting claims of parties, or modes of enjoyment are to be adjusted.¹

In most, if not all, the States, the jurisdiction of the courts in relation to partition suits, is regulated by very minute statutory provisions, and to these reference must be made for the particular methods of procedure, and the powers of court.

When may be maintained.—Under the Michigan statute, all persons holding lands as joint tenants, or tenants in common, are entitled to partition of the same. Any one or more of the persons so holding land may institute suit in the Circuit Court for the county in which the land lies for a division or partition thereof, according to the respective rights of the parties interested therein; and for a sale thereof, if it appears that a partition can not be made without great prejudice to the owners. In case such lands are situated in different counties, the suit may be instituted in the Circuit Court for any one of the counties in which any part of such lands may be situated, and such court shall have complete jurisdiction in the premises as fully and effectually as if the whole of such lands were situated in the county in which the suit is instituted.²

Such suits can not be maintained by one who has only an estate therein in remainder or reversion.³

Such suits may also be maintained by any person who has an estate in possession in any ores, minerals or metals that may exist or be hereafter discovered in such lands, and such suit shall be brought only against such persons as may have an estate in possession in such ores, minerals or metals.⁴

The Probate Court has also power to decree partition in the closing up of estates, when assigned to heirs, devisees or legatees, and held by them in common.⁵

The party applying for partition must have a present interest in the premises, as a joint tenant or tenant in common, and he

¹ *Gregory v. Grover*, 19 Ill. 608; *Walker v. Laftin*, 26 Ill. 472; *Wilton v. Tazewell*, 86 Ill. 29; *Labidie v. Hewett*, 85 Ill. 341.

² How. St. Supp. § 7851; see *Payne*

v. Avery, 12 Mich. 540; *Campau v. Campau*, 19 Mich. 116.

³ How. St. Supp. § 7852; *Metcalf v. Miller*, 96 Mich. 459.

⁴ How. St. Supp. § 7852.

⁵ How. St. § 5963.

must also be actually or constructively in possession of his undivided share.¹

If the lands are adversely held and he has no such possession, and if the title is doubtful and suspicious, a bill for partition would be premature. Under such circumstances, the plaintiff should first establish his title at law.²

When the State holds lands with individuals as tenants in common, the same proceedings are had for partition as against an individual. The subpoena and notices are served on the attorney-general, who appears for the State, and the State bears its portion of the costs.³ Claims to land, barred by the statute of limitations, will not be reviewed by proceedings in partition.⁴

The court of chancery, where the title is undisputed, has jurisdiction in partition proceedings between joint owners of land, notwithstanding a remedy at law is given by the statute.⁵ The court can not decree partition on a foreclosure bill.⁶ In the case of proceedings against non-residents, all the facts necessary to give the court jurisdiction must appear affirmatively upon the record.⁷

Partition of personal property.—Courts of equity have exclusive jurisdiction of suits for the partition of personal property, even though the defendants deny the complainant's title.⁸

SECTION II.

PARTIES TO.

Complainant.—The complainant, in a suit for partition, must have an estate in possession in the lands of which parti-

¹ How. St. Supp. § 7852; *McCartney v. Osborn*, 118 Ill. 505; see *Hoffman v. Beard*, 22 Mich. 65; *Hemingway v. Griswold*, Ib. 77.

² *Hoffman v. Beard*, 22 Mich. 65; *Fenton v. Mackinaw*, 76 Mich. 405.

³ How. St. § 7928.

⁴ *Ibid.* § 7930.

⁵ *Thayer v. Lane*, Har. Ch. 247; *Hoffman v. Beard*, 22 Mich. 64.

⁶ *Payne v. Avery*, 21 Mich. 541.

⁷ *Platt v. Stewart*, 10 Mich. 260; *King v. Harrington*, 14 Mich. 532; *Merrill v. Montgomery*, 25 Mich. 73.

⁸ *Godfrey v. White*, 60 Mich. 443; *Smith v. Smith*, 4 Rand. 102; *Conover v. Earl*, 26 Iowa 167; *Marshall v. Crows*, 29 Ala. 278; *Irwin v. King*, 6 Ired. 219; *Tinney v. Stebbins*, 28 Barb. 290; *Low v. Holmes*, 17 N. J. Eq. 148.

tion is sought. An estate in remainder or reversion is not sufficient.¹ One who has an undivided interest in a life estate in lands, and also an undivided interest in the reversion, can not maintain a bill for partition against the other reversioners.² An "estate in possession," as we have seen, means an estate in present enjoyment, whether occupied by defendant's tenants, or entirely unoccupied.³

Defendants.—Every person, in possession or otherwise, having an interest in the premises sought to be partitioned, and every person entitled to dower in the same, if the dower has not been admeasured, may be made parties to the suit.⁴ In Illinois it has been held that previous to the revised statute, neither a mortgagee nor a judgment creditor was a proper party to a partition suit, and that their rights could not be affected by a sale of the lands;⁵ but inasmuch as the statutes have authorized the court to decree a sale, which will give a purchaser a perfect title, or to apportion incumbrances among the parties to whom the incumbered portion is allotted, it is necessary that all incumbrancers should be made parties.⁶

The Michigan statute provides, that in the first instance it is not necessary to make any creditor, having a lien on the premises in question, or any part thereof, by judgment, decree, mortgage, or otherwise, a party to the proceedings, nor shall the partition of the premises alter, affect or impair the lien of any creditor, with the following exception: 'If the lien is on the undivided interest or estate of any of the parties, either in a portion or the whole of the premises partitioned, such lien, if partition be made, shall thereafter be transferred and be a charge only on the premises assigned to such party, and may be enforced against the same, as though such lien had originally existed thereupon; but if the person having such lien be made a party to such suit, the court may direct the commissioners appointed to make such partition, to designate and set apart a tract or portion of the premises equal in value

¹ How. St. Supp. § 7852; *Hoffman v. Beard*, 22 Mich. 69.

² *Metcalfe v. Miller*, 96 Mich. 459.

³ *Eberts v. Fisher*, 44 Mich. 551.

⁴ How. St. § 7854; *Striker v. Mott*, 2 Paige Ch. 387; *Benedict v. Beurman*, 90 Mich. 396.

⁵ *Welton v. Copeland*, 7 Johns. Ch. 140; *Sebring v. Mersereau*, Hopk. Ch. 501; *Harwood v. Kirby*, 1 Paige Ch. 469.

⁶ *Loomis v. Riley*, 24 Ill. 307; see *Kilgour v. Crawford*, 51 Ill. 249.

⁷ How. St. § 7856.

to the estate or interest of the party to whose portion the lien is to be transferred, in the tract upon which such lien had before existed; and on the confirmation of the report of such commissioners, such lien shall thereupon be transferred to the portion of the premises so designated by the commissioners, with the same effect as is above provided in case the person having such lien is not a party to such suit. The portion of the premises to which the lien is transferred shall be first charged with the just proportion of the costs of the proceedings in preference to said lien. If, at any time prior to the confirmation of the report of the commissioners appointed to make such partition, any person had an uncertain or contingent interest in any part of the premises, which has since the filing of the bill become a certain or absolute interest, or who has acquired a title in fee to any part of said premises by virtue of any mortgage or execution sale of any interest thereon, shall apply to the court by petition, setting forth his interest in the premises, the court shall thereupon direct that such person be made a party to such proceedings, and shall make such other or further orders and decrees respecting the rights of such person, as shall be agreeable to equity.¹ The complainants may, at their election, make every creditor having a specific lien on the undivided interest or estate of any of the parties, by mortgage or otherwise, a party to the proceedings; and in such case the bill shall set forth the nature of every such lien or incumbrance.² But a tax title purchaser need not be made a party if the land can still be redeemed.³

Unknown defendants.—If any parties having an interest in such lands are unknown, or if either of the known parties reside out of this State, or can not be found therein, and such facts be made to appear to the court by affidavit, an order may be made by the court containing a sufficient description of the premises whereof partition is sought, and requiring all parties interested to appear and answer the bill by a day in such order to be specified, which order shall be served personally, or shall be published once in each week successively in such paper as may be designated in such order, and for such

¹ How. St. § 7857; *Benedict v. Torrent*, 83 Mich. 181.

² How. St. § 7858; *Whiting v. Butler*, 29 Mich. 123.

³ *Eberts v. Fisher*, 44 Mich. 551.

time as the court shall designate, not exceeding three months.¹ The proof of personal service or of the publication of such order, shall authorize an order of the court for taking the bill as confessed against all such unknown parties; and persons not resident in this State, or not found therein, as shall not appear and answer by the day mentioned in the order, or on such further day as the court may appoint, and all such unknown parties as may appear, shall be entitled to be made parties to the suit, and the bill may be amended accordingly.²

Guardian for minors.—The general guardians residing in this State, of all minors and other persons under guardianship, who should be parties to such proceedings for partition, upon giving bond as hereinafter directed, shall represent their respective wards therein, whether such wards shall reside in or out of this State; and the court shall appoint guardians for all such minors who shall be interested in the premises, as have no general guardians in this State, for the special purpose of taking charge of the interests of such minors, in relation to the proceedings; and the acts of all such guardians of minors, or others under guardianship, shall be binding on their respective wards, and shall be as valid as if done by them respectively when of full age, or under no legal incapacity.³

Bond required.—Every such guardian shall give bond to the people of this State, to be filed with the clerk of the court, in such penalty, and with such surety as the court shall direct, conditioned for the faithful performance of the trust reposed in such guardian, and to render a just and true account of his guardianship in all courts and places when thereunto required, and for the observance of the orders of the court in relation to the said trust.

When the guardian fails to give the required bond, the court will appoint its clerk as guardian and dispense with security.⁴

¹ How. St. § 7860; *Platt v. Stewart*, 10 Mich. 260; *King v. Harrington*, 14 Mich. 532.

² *Ibid.* § 7861.

³ *Ibid.* § 7862; see *Prince v. Clark*, 81 Mich. 167.

⁴ How. St. § 7863-4.

SECTION III.

BILL.

What to set forth.—The statute provides that the bill for a partition or sale of any such lands, shall be verified by oath, and shall particularly describe the premises sought to be divided, and shall set forth the rights and titles of all persons interested therein, so far as the same are known to the complainant, including the interest of any tenant for years, for life, by the courtesy or in dower, and the persons entitled to the reversion, remainder or inheritance after the termination of any particular estate therein, and every person who, by any contingency contained in any devise, grant or otherwise, may be, or become entitled to any beneficial interest in the premises.¹ If the defendants can be found, or if they reside in this State, they must be served with subpoena to appear, as in other cases, and the bill may be taken as confessed, according to the practice in courts of equity.²

In case any of the parties just mentioned, or the share or interest of any of them be unknown, or uncertain or contingent, or the ownership of the inheritance shall depend upon an executory devise, or the remainder shall be a contingent remainder, so that such parties can not be named, the same shall be set forth in the bill.³

A bill that discloses that persons who are not made parties have like interests with those that are set up by the complainant, is demurrable for want of parties.⁴ The equitable rights of the parties must appear from the pleadings.⁵ A statement in a bill by executors or devisees that the undivided half of the premises was devised to the latter in common, with power in the executor to sell, is a sufficient allegation of the latter's interests when they claim no partition between themselves.⁶

Answer.—If the defendants rely upon a lease, they must include such averments in their answer as will enable them to maintain their interests, so that whether the land be parti-

¹ How. St. § 7853.

² Ibid. § 7859; *Eberts v. Fisher*, 44 Mich. 551.

³ How. St. § 7855.

⁴ *Taylor v. King*, 46 Mich. 42.

⁵ *Thayer v. Lane*, Walk. Ch. 204.

⁶ *Page v. Webster*, 8 Mich. 263.

tioned or sold, equities may be adjusted in it or its proceeds.¹ Any defendant may deny the joint tenancy, or tenancy in common of any co-defendant.²

Feigned issue.—Whenever the court shall deem it necessary, for the purpose of determining the rights of any of the parties in the premises of which partition shall be sought, that any issue of fact between the parties or any of them, should be tried by a jury, such court may award a feigned issue for that purpose, which shall be tried by a jury, and the verdict thereon be returned as in other cases and with like effect.³

Amendment of bill.—Either before or after the trial of such issue, the court may permit the bill and all subsequent proceedings to be amended so as to represent truly the rights claimed by any party; or so as to make any person a defendant who shall have appeared in the course of the proceedings to be interested in the premises, and who might originally have been made a defendant if his interest had then existed or been known; but no person shall be so made a defendant, unless by his consent, without twenty days' notice of the motion to that effect being personally served on him, or published once in each week successively for one month in such paper as the court may direct.⁴ After any such amendment, any party whose rights are affected thereby, and who has not had an opportunity to sustain his claim, shall have the right to answer the bill, or to put in a further answer thereto, and to maintain his claim, as the circumstances of the case may render proper.⁵

The statute also provides that "before making any order of sale of the said premises where creditors or other persons, having specific liens, or purchasers at mortgage or execution sales of interests in any part of the premises, shall not have been made parties, the court shall direct the complainant to amend his bill by making parties to the proceedings every person having a specific lien on the undivided interest or estate of any of the parties by mortgage or otherwise, and also persons who have acquired an interest under mortgage or execu-

¹ *Eberts v. Fisher*, 44 Mich. 551.

² How. St. § 7865.

³ How. St. § 7865; *Hoffman v. Beard*, 22 Mich. 69.

⁴ How. St. § 7866.

⁵ How. St. § 7867.

tion sales.¹ When the suit is commenced a notice *lis pendens* should be filed.

It is not necessary to allege or prove the inability of tenants in common to agree upon a partition,² and the motive of the party seeking partition is wholly immaterial.³

No. 183. Bill for partition between two heirs, subject to widow's dower.

STATE OF MICHIGAN.

The Circuit Court for the County of ———. In Chancery.

To the Circuit Court for the County of ———. In Chancery.

1. Your orator, A B, of, etc., respectfully represents unto this honorable court that B B, late of, etc., deceased, the father of your orator, was in his lifetime, and at the time of his death, the owner, and seized in fee simple of the following described real estate, to wit (*Here describe the premises*):

2. Your orator further represents, that the said B B, being so seized of the said real estate, on or about, etc., departed this life intestate, leaving C B, his widow, and your orator and D B, his sons, and only heirs-at-law.

3. And your orator further represents, that by the death of the said B B, your orator and the said D B became seized in fee as tenants in common, by descent from the said B B, of the said described premises; that is to say your orator and the said D B each became seized of the one equal undivided half part of the said premises, each of the said portions being subject, however, to the right of dower of the said C B, widow of the said B B.

4. And your orator further represents, that the dower of the said widow in the said described premises, has never been admeasured, or in any way set apart to her from the estate of the said B B.

5. Your orator further represents, that no person or persons, other than your orator and the said D B and C B, have any interest in, or title to the said described premises, or any part thereof, in possession, remainder, reversion or otherwise.

6. Your orator further represents, that he is desirous that a partition or division should be made of the said several parcels of land between your orator and the said D B, according to their respective rights, estates and interests therein; or in case the same can not be divided and partitioned without material injury to the parties interested therein, then that the same may be sold, and the proceeds thereof divided among such parties, according to their respective rights and interests.

7. Your orator further represents, that he has frequently applied to the said D B, and requested him to come to an equitable and just division and partition of the said described premises, between your orator and the said D B, or in case they can not agree upon an amicable division, that they join in making sale of the said premises, and divide the proceeds thereof; but so it is, may it please your honor, the said D B wholly refuses to join in any just and equitable division or partition of the said described premises, or to join in the sale thereof as aforesaid.

¹ How. St. § 7887.

² *Trainor v. Greenough*, 145 Ill. 543; *Lake v. Jarret*, 12 Ind. 395;

Willard v. Willard, 6 Mackey, 559; *Bradley v. Harkness*, 26 Cal. 77.

³ *Ibid.*

Forasmuch, therefore, as your orator is without remedy in the premises, except in a court of equity, your orator prays :

I. That the said D B and C B, who are made parties defendant to this bill, may be required to make full and direct answer to the same, *but not under oath, the answer under oath being hereby waived;*

II. That division and partition of the above described premises may be made between the parties, according to the course of practice in this court and the statute in such case made and provided, and according to the respective rights of the parties interested therein, subject to the widow's dower as aforesaid.

III. And in case it shall appear that a partition thereof can not be made without manifest injury to the rights of the parties therein, then that the said premises may be decreed to be sold under the direction of this court, and the proceeds of the sale, after paying the costs and charges of this suit, be divided among the said parties, according to their respective rights and interests therein.

IV. And that the rights and interests of the said parties in the premises or in the proceeds thereof, may be ascertained and declared by the court.

V. And that your orator may have such other and further relief in the premises, as equity may require, and to this honorable court shall seem meet.

(Add prayer for process and verification.)

No. 184. Bill for partition.

STATE OF MICHIGAN.

The Circuit Court for the County of ——. In Chancery.
To the Circuit Court for the County of ——. In Chancery.

1. Your orator and oratrix, A B, and B B, his wife, of, etc., respectfully represent unto this honorable court, that E F, the father of your oratrix, B B, and late of, etc., now deceased, was at the time of making his last will and testament, and also at the time of his death, seized in fee simple, and possessed of all the following described real estate, to wit (*Here describe the premises*); and being so seized and possessed as aforesaid, the said E F departed this life on or about the, etc.

2. And your orator and oratrix further represent, that the said E F, in his lifetime, to wit, on or about the, etc., made and published his last will and testament in due form of law, and duly authenticated to pass real estate; and in and by the said last will and testament the said testator did, among other things, give, devise and bequeath unto his son, A F, and to his heirs forever, all of the above described premises, subject to a life estate therein of his mother, B F, the widow of the said E F; as will more fully appear by the said will, when produced, and by a copy thereof, hereto attached, marked "Exhibit A," and made a part of this bill.

3. Your orator and oratrix further represent, that the said last will and testament of the said E F, was afterwards, on, etc., duly proved and probated by the — court of, etc., as will more fully appear by the record thereof, in the office of the clerk of said — court, reference thereto being had.

4. Your orator and oratrix further represent, that the said A F, on, etc., departed this life intestate, and without lawful issue; leaving your oratrix,

the said B B, wife of your orator, A B, S M, widow of C M, deceased, J B, C D and M W, his only heirs-at-law him surviving.

5. And your orator and oratrix further represent, that the said B F, widow of the said E F, the testator aforesaid, departed this life on or about, etc.; and that by means of the deaths of the said A F and B F, as aforesaid, the said described premises became and was vested in your oratrix, S M, widow of C M, deceased, J B, C D and M W, the only heirs-at-law of the said A F, as tenants in common in fee.

6. Your orator and oratrix further represent, that on, etc., and subsequent to the death of the said A F, the said J B, and S B, his wife, by their certain deed, executed and acknowledged in due form of law, to pass the title to real estate, did remise, release, and quit-claim unto your orator all their right, title and interest of, in and to the aforesaid described premises; as by the said deed, when produced, will more fully appear.

7. And your orator and oratrix further represent unto your honor, that the several parties to this suit are seized in fee simple, and entitled to the said described premises, as tenants in common; and that their rights and interests therein are as follows, to wit: your orator, A B, as the grantee of the said J B, is seized of and entitled to an undivided — part thereof; that your oratrix, B B, in her own right, is also seized of, and entitled to an undivided — part thereof, etc. (*Here set forth the interests of all the parties.*)

8. Your orator and oratrix further represent, that the aforesaid premises is the only real estate owned in common by the parties to this suit; and that no other person or persons than the parties above named, have any interest in, or title to, the said described premises, or any part thereof, in possession, remainder, reversion, or otherwise.

9. And your orator and oratrix further represent, that they are desirous that a division or partition of the said described premises should be made among the several parties seized of, or entitled thereto, according to their respective rights and interests therein: and in case the same can not be divided among the owners thereof, without manifest injury or prejudice to the parties interested therein, that then the same may be sold, and the proceeds thereof divided among such parties, according to their respective rights and interests; and for that purpose have made frequent applications to the other owners thereof. And your orator and oratrix well hoped that they would have come to an equitable division and partition, as requested by your orator and oratrix, as in justice and equity they ought to have done. But now so it is, may it please your honor, that the said S M, C D and M W, defendants in this suit, refuse, under various pretenses, all of which are untrue, to comply with the reasonable request of your orator and oratrix, to join in a partition and division of the said premises. All of which actings, doings and pretenses are contrary to equity.

Forasmuch, therefore, as they are without remedy in the premises, except in a court of equity, your orator and oratrix pray:

I. That the said S M, C D and M W, who are made parties defendants to this bill, may be required to make full and direct answer to the same, *but not under oath, the answer under oath being hereby waived;*

II. That the parts or shares justly belonging to your orator and oratrix,

and all the other owners hereinbefore named of, in and to the aforesaid premises, may be settled and ascertained by and under the direction of this court;

III. That a fair division and partition thereof may be made between your orator and oratrix, and all other persons who shall appear to be owners of or interested therein, according to the respective rights and interests of each therein;

IV. That proper commissioners may be appointed to make division and partition of the said premises, among the parties interested therein;

V. Or, in case a partition thereof, or any part thereof, by metes and bounds, or a division can not be made without manifest prejudice to the owners, then that the same, or such parts thereof as can not be so divided and partitioned, may be sold by and under the direction of this court;

VI. That the proceeds of the sale, after paying the costs and charges of this suit, may be divided among the owners thereof according to their several rights and interests therein;

VII. And that, to that end, the rights and interests of the parties interested in the said premises, or in the proceeds of the sale thereof, may be ascertained and declared by the order or decree of this court;

VIII. And that your orator and oratrix may have such other and further relief in the premises, as equity may require, and to this honorable court shall seem meet.

May it please the court, etc. (*Prayer for process and verification.*)

No. 185. Bill for partition and dower.

STATE OF MICHIGAN.

The Circuit Court for the County of ——. In Chancery.

To the Circuit Court for the County of ——. In Chancery.

1. Your oratrix, A B, and your orators, B B and C B, of, etc., respectfully represent unto this honorable court, that on, etc., one E B, late of, etc., departed this life intestate, leaving your oratrix, A B, his widow, and your orators, B B and C B, his sons, and F B, G B and H B, his daughters, and only children and heirs at law; that at the time of his death the said E B was possessed and seized in fee simple of the following described real estate, to wit (*Here describe the premises*); and that the said E B derived title to the said premises in the manner following, to wit (*Here set forth the chain of title*):

2. And your oratrix and orators further represent, that no person or persons, other than your oratrix and orators, and the said F B, G B and H B, have any interest in, or title to, the said described premises, or to any part thereof, in possession, remainder, reversion or otherwise.

3. Your oratrix and orators further represent, that the said G B and H B are minors, under the age of — years; and that no legal guardian has been appointed for them, by reason whereof the said G B and H B are severally incompetent to join in a voluntary partition and division of said premises, and to set apart the dower of your oratrix therein, or to consent to a sale thereof; and as your oratrix and orators are advised, no valid division and partition, or assignment of dower, or a sale of said premises, can be affected without the aid and interposition of some court of competent jurisdiction.

Forasmuch, therefore, as they are without remedy in the premises, except in a court of equity, your oratrix and orators pray:

I. That the said F B, G B and H B, who are made parties defendant to this bill, may be required to make full and direct answer to the same, *but not under oath, the answer under oath being hereby waived;*

II. That a guardian *ad litem* may be appointed by the court for the said infant defendants; that the dower of your oratrix in the said premises may be assigned and set apart to her;

III. That a division and partition of the residue thereof may be made by and under the direction of this court, between your orators B B and C B and the defendants, F B, G B and H B, according to their respective rights and interests therein, to be adjudged by the court;

IV. And that in case an assignment of dower, and division and partition in the said premises can not be made without manifest prejudice to the parties interested, that the same may be sold, under the directions of the court, and the proceeds thereof distributed between the parties, according to their respective interests;

V. And that your oratrix and orators may have such other and further relief in the premises, as equity may require and to this honorable court shall seem meet.

May it please, etc. (*Prayer for process and verification.*)

SECTION IV.

REFERENCE AND PROCEEDINGS.

Reference on bill confessed.—If the bill shall be taken as confessed by any of the defendants, whether known or unknown, the court shall order a reference to a master to take proof of the title of the complainants, and report the same to the court; and the complainants shall exhibit before such master proof of their title, and an abstract of the conveyances by which the same is held.¹

Reference to ascertain situation of premises.—Upon making a decree for partition as provided in Section 7869 and Section 7870, How. Statute, an order shall be entered referring it to a master to inquire into the situation of the premises, and to report whether such premises, or any part of them, are so circumstanced that a partition and division thereof among the parties interested can not be made without great prejudice to the owners.²

When partition proceedings are directed against several distinct parcels of land, each is subject to partition by itself.³

¹ How. St. § 7868.

² *Walsh v. Varney*, 38 Mich. 73.

³ How. St. § 7871.

SECTION V.

PROCEEDINGS TO DECREE.

Under our practice there are two methods of partition. One is by sale of the premises, and the other is a division of the property without sale. Sale is decreed when, from the situation of the property, it can not well be divided.

Appointment of commissioners.—If upon the coming in of the report of the master, the court shall be satisfied that partition of the premises between the parties interested therein can be made without prejudice to the owners, such court shall, by an order to be entered in its minutes, appoint three discreet and disinterested freeholders, commissioners, to make the partition so decreed, according to the respective rights and interests of the parties, as the same were ascertained and determined by such court, and in such order the court shall designate the part or shares, if any, which shall remain undivided, for the owners whose interests shall be unknown or not ascertained.¹

Vacancies.—If the persons so appointed commissioners, or either of them, shall die, resign or neglect to serve, the court may, from time to time, appoint others in their places.²

Oath to commissioners.—The commissioners, before proceeding to the execution of their duties, shall severally be sworn before any officer authorized to administer oaths, honestly and impartially to execute the trust reposed in them, and to make partition as directed by the court; which oath shall be filed with the clerk of the court, on or before the coming in of the report of such commissioners.³

Partition, how made.—In making partition, the commissioners shall divide the said real estate, and allot the several portions and shares thereof to the respective parties, quality and quantity relatively considered, according to the respective rights and interests of the parties so adjudged and decreed by the court, designating the several shares and portions by posts, stones or other permanent monuments; and they may, if necessary, employ a surveyor with the necessary assistants, to aid them therein.⁴

¹ How. St. § 7872.

³ Ibid. § 7874.

² Ibid. § 7873.

⁴ Ibid. § 7875.

Report of commissioners.—The commissioners shall make an ample report of their proceedings, under the hands of any two of them, specifying therein the manner of executing their trust, and describing the land divided, and the shares allotted to each party, with convenient certainty, and the items of their charges.¹ All the commissioners must meet together in the performance of any of their duties, but the acts of a majority so met shall be valid.² The suit will abate by the death of one of the tenants in common, if he dies after the appointment of commissioners. No further proceedings, in such a case, can be taken until the suit is renewed.³ The commissioners' report will only be set aside on such grounds as will set aside a verdict.⁴

Fees.—The expenses of the commissioners, including the expenses of a surveyor and his assistants, when they shall be employed, shall be ascertained and allowed by the court; and the amount thereof, together with such compensation as shall be allowed to the commissioners by the court, for their services, shall be paid by the complainants, and shall be allowed to them as part of the costs to be taxed.⁵

Meeting of commissioners—Notice—Joint action.—In a suit for partition of lands, under Chapter 270, How. Stat., notice to the defendants of the meetings of the commissioners is essential to the validity of their action. The requirements of such notice is always implied, when not expressed in the statute.

The deliberations of the commissioners should be had together, and all must be present when final action is taken, and the report is made and signed; although a majority can sign and acknowledge such report.⁶

If the commissioners to make partition desire information respecting their duties, they should apply to the court for instruction. There can be no objections to their notifying all parties to appear before them, at a time and place to be stated,

¹ How. St. § 7876.

² Ibid. § 7877.

³ *Reynolds v. Reynolds*, 5 Paige 161.

⁴ 9 How. Pr. 71.

⁵ How. St. § 7878.

⁶ How. St. § 7877; *Allan v. Wayne*,

57 Mich. 198; *Simpson v. Simpson*, 59 Mich. 71; *Wagar v. Briscoe*,

38 Mich. 587; *Dickinson v. Van Wormer*, 39 Mich. 141; *Houghton v. Auditor*, 41 Mich. 28; *R. Co. v. Sturgis*, 44 Mich. 538; *Adair v. Cummin*, 48 Mich. 379.

and affording them an opportunity to produce proof respecting the value of the land to be partitioned, should they desire to embrace it; but in the deliberations of the commissioners, and in the preparation of their report, all interested parties should be excluded.¹

Report may be set aside.—On good cause shown, the court may set aside the report and commit the case to the same, or appoint new commissioners, as often as may be necessary, who shall proceed in like manner as hereinbefore directed.²

Confirmation.—Upon the confirmation of the report of any commissioners by the court, a decree shall thereupon be entered, that such partition shall be firm and effectual forever; and such decree shall be binding and conclusive:

1. On all parties named therein, and their legal representatives, who shall, at the time, have any interest in the premises divided, as owners in fee, or as tenants for years, or as entitled to the reversion, remainder, or inheritance of such premises, after the termination of any particular estate therein; or who, by any contingency contained in any will or grant, or otherwise, may be or become entitled to any beneficial interest in the premises, or who shall have any interest in any undivided share of the premises, as tenant for years, for life, by the courtesy, or in dower.

2. On all persons interested in the premises, who may be unknown, to whom notice shall have been given by personal service, or by publishing the same as is hereinbefore directed.

3. On all other persons claiming from such parties or persons or either of them.³

Persons not affected.—But such decree and partition shall not affect any tenants, or persons having claims as tenants, in dower, by the courtesy, or for life, to the whole of the premises which shall be the subject of such partition; nor shall any such decree and partition preclude any person, except such as are specified in the last preceding section, from claiming any title to the premises in question, or from controverting the

¹ *McLaughlin v. Wayne*, 57 Mich. 35, 36; *Paul v. Detroit*, 32 Mich. 109; *R. R. Co. v. Probate Judge*, 53

Mich. 218; *Peavey v. Wolfborough*, 37 N. H. 286.

² How. St. § 7879.

³ *Ibid.* § 7880.

title or interest of the parties, between whom such partition shall be made.¹

Partition among heirs.—It is provided by the Michigan statute, that the provisions of the act of the legislature upon partition shall be applicable to lands held by a trustee for the benefit of parties having a beneficial interest therein, and the proceedings for a partition may be instituted by the trustee, or any party interested in the lands so held, and shall be regulated by the provisions of the act, except as hereafter set forth.² Where the original parties in interest in said trust, or any of them, may have departed this life, leaving heirs or legatees, or others interested by title or right through them or any of them in said lands, it shall be competent for the court, at its discretion, to divide the said land by decree, among the said heirs, legatees, or others representing the interests of the deceased therein, so as to set off the interest of all such parties together, without subdivision among them.³

In any case where it may be deemed expedient to decree that the interest which may have belonged to any deceased party shall be set off in a body, without subdivision, to those claiming under him, it shall be sufficient to provide by the decree that such parcel or interest shall be set off to the heirs, assigns, or those legally entitled under or through the party originally interested, who may have deceased, mentioning his name in the decree.⁴

In all cases where the original parties in interest are fully known, but where by death, legal proceedings or other operations of law, it has become uncertain who are the present parties in interest, it shall be competent and lawful to separate the portion or interest in such lands originally owned by said parties, in the manner provided in the foregoing sections, instead of leaving it with the land undivided as belonging to unknown owners; and such divisions and decree shall operate to convey the title to those claiming under said party, according to the legal rights, whatever they may be.⁵

¹ How. St. § 7881; *Greiner v. Klein*,
28 Mich. 20.

² Ibid. § 7932.

³ Ibid. § 7933.

⁴ Ibid. § 7934.

⁵ Ibid. § 7935.

PARTITION BY SALE.

When court to order sale.—If the commissioner to whom reference shall be made, as hereinbefore provided, shall report to the court that all the lands or tenements of which division and partition is sought, are so situated, or that any district, tract, lot, or portion thereof, is so situated that a partition and division thereof among the persons interested therein can not be made without great prejudice to the owners, and if the court shall be satisfied that such report is just and correct, the court may thereupon make an order that the commissioner sell the premises so situated, at public auction, to the highest bidder; and if said commissioner shall report that any portion, interest, or part can be divided, and partitions made thereof, and that other portions, interests, or parts can not be so divided without great prejudice to the owner thereof, the court shall, if satisfied that such report is just, by an order, appoint commissioners as hereinbefore provided, and direct said commissioners to proceed to make partition and division of such parts or interest of which division can be made, and set apart such portion, interest, or parts thereof to be sold, and the same may be sold as hereinafter provided.¹

Order directing terms of credit.—The court shall direct, in such order, the terms of credit which may be allowed for any portions of the purchase money of which it shall think proper to direct the investment, and for such portions of such purchase money as are required by the provisions hereinafter contained, to be invested for the benefit of any unknown owners, any infants, any parties out of the State, or any tenants for life in dower, or by the courtesy.² The portions of the purchase money for which credit shall be allowed, shall always be secured at interest, by a mortgage of the premises sold, by a bond of the purchaser, and by such other security as the court shall prescribe.³

Separate securities.—The master may take separate mortgages and other securities, for such convenient shares or portions of the purchase money as are directed by the court to be invested, in the name of the clerk of the court in whose

¹ How. St. § 7882.

² Ibid. § 7884.

³ Ibid. § 7883.

office the original bill for a partition was filed, and his successors in office; and for such shares as any known owner of full age shall desire to have so invested, in the name of such owner.¹

To whom delivered.—Upon such sales being confirmed, as hereinafter mentioned, the said master shall deliver such mortgages and other securities to the clerk of the court, or to the known owners whose shares were so invested.²

Certain moneys to be brought into court.—If it shall appear by the proceedings on such bill, or by such report, that there are any existing incumbrances upon the estate or interest in the premises, of any party named in the proceedings in the suit, the court shall, in the order of sale, direct the master to bring into court and pay to the clerk, the portion of the moneys arising from the sale of the estate and interest of such party, after deducting the portion of the costs, charges and expenses to which it shall be liable.³

Application for moneys.—Such party may apply to the court to order such moneys, or such part thereof as he shall claim, to be paid to him; which application shall be accompanied:

1. By his own affidavit, stating the true amount actually due on each incumbrance, the owner of such incumbrance, and his residence, as far as known to such party.

2. By proof by affidavit, of the due service of a notice on each owner of any incumbrance, of the intention to make such application, at least fourteen days previously. If such owner reside in this State, such notice shall be served personally, or if he be absent from his residence, by leaving a copy there, with some person of his household of proper age. If such owner reside out of this State, such notice may be served on him personally, thirty days previously, or by publishing the same in such paper as the court may direct, three weeks successively, once in each week.⁴

Proceedings thereon.—Upon such application and proof of notice, the court shall proceed to hear the proofs and allegations of the parties; and if any question of fact shall arise, which, in the opinion of the court, can not be satisfactorily determined without a trial by jury, the court shall award a

¹ How. St. § 7885.

² Ibid. § 7886.

³ Ibid. § 7888.

⁴ Ibid. St. § 7839.

feigned issue, to be tried as in other cases, and the costs of such trial shall be paid by the party failing, which payment shall be enforced by attachment as in other cases.¹

Distribution.—When the amount of existing incumbrances shall have been ascertained, the court shall proceed to order a distribution of the moneys so brought into and remaining in court, among the several creditors having such incumbrances, according to the priority thereof respectively.²

Discharge of incumbrances.—The clerk of the court by whom any such incumbrance shall be paid off, shall procure satisfaction thereof to be acknowledged, in the form required by law, and shall cause such incumbrance to be duly satisfied or canceled of record, and shall defray the expenses thereof out of the portion of the moneys in court belonging to the party by whom such incumbrance was payable.³ The proceedings to ascertain and settle the amount of incumbrances as herein provided, shall not affect any other party in such suit for partition, nor delay the paying over or investing the moneys to or for the benefit of any party, upon whose estate in the premises there shall not appear to be any existing incumbrances.⁴

Sale of dower or life estate.—Whenever the estate of any tenant in dower, or by the courtesy, or for life, in the whole or any part or share of the premises in question, has been admitted by the parties, or ascertained by the court, to be existing at the time of the order for such sale, and the person entitled to such estate has been made a party to the proceedings, the court shall first consider and determine, under all the circumstances of the case, whether such estate ought to be excepted from such sale, or whether the same should be sold, and in making such determination, regard shall be had to the interests of all the parties.⁵ If a sale of the premises, including such estate, shall be ordered, the estate and interest of every such tenant or person shall pass thereby, and the purchaser, his heirs and assigns, shall hold such premises free and discharged from all claims by virtue of any such estate or interest, whether the same be to any undivided share of a joint

¹ How. St. § 7890.

⁴ Ibid. § 7893.

² Ibid. § 7891.

⁵ Ibid. St. § 7394.

³ Ibid. § 7892.

tenant, or tenant in common, or to the whole or any part of the premises sold.¹

Upon such sale being made of any such interest or estate, the court shall direct the payment of such sum in gross, out of the proceeds thereof, to the person entitled to such estate in dower, tenancy by the courtesy, or tenancy for life, as shall be deemed upon the principles of law applicable to annuities, a reasonable satisfaction for such estate or interest, and which the person so entitled shall consent to accept in lieu thereof, by an instrument under seal duly acknowledged or proved in the manner that deeds are required to be acknowledged or proved, to entitle them to be recorded.² In case no such consent is given at or before the coming in of the report of sale by the master, then the court shall ascertain and determine what proportion of the proceeds of such sale, after deducting all expenses, will be a just and reasonable sum to be invested for the benefit of the person entitled to such estate or interest in dower, by the courtesy, or for life, and shall order the same to be brought into court for that purpose.³

How proceeds to be invested determined.—The proportions of the proceeds of such sale to be invested, shall be ascertained and determined, in the several cases, as follows :

1. If an estate in dower shall have been included in such order of sale, its proportion shall be one-third of the proceeds of the sale of the premises, or of the sale of the undivided share in such premises, upon which such claim of dower existed.

2. If an estate by the courtesy, or other estate for life, shall be included in the order of sale, its proportion shall be the whole proceeds of the sale of the premises, or of the sale of the undivided share thereof, in which such estate shall be.

And in all cases, the proportion of the expenses of the proceedings shall be deducted from the proceeds of such sale.⁴

If the persons entitled to any such estate in dower, by the courtesy, or for life, be unknown, the court shall take order for the protection of the rights of such persons, in the same manner, as far as may be, as if they were known and had appeared.⁵

¹ How. St. § 7895.

⁴ Ibid. § 7898.

² Ibid. § 7896.

⁵ Ibid. § 7899.

³ Ibid. § 7897.

Sale, and how conducted.—The master shall give notice of any sale to be made by him, for the same time, and in the same manner, as is required by law on sales of real estate by sheriffs on execution.¹ The terms of such sale shall be made known at the time; and if the premises consist of distinct lots, tracts or parcels, they shall be sold separately.² No such master, nor any person for his benefit, shall be interested in the purchase, nor directly or indirectly purchase any of the premises sold, nor shall any guardian of any infant party in such suit, purchase or be interested in the purchase of any lands, being the subject of such suit, except for the benefit or in behalf of such infant; and all sales contrary to the provisions of this section shall be void.³

Report of sale.—After completing such sale, the master shall report the same to the court, with a description of the different parcels of land sold to each purchaser, the name of such purchaser, and the price bid by him, which report shall be filed in the court.⁴

Conveyances.—If such sales be approved and confirmed by the court, an order shall be entered directing the master to execute conveyances pursuant to such sales; which such master shall be authorized to do upon the entry of such order.⁵ Such conveyances so executed shall be recorded in the county where the premises are situated, and shall be a bar, both in law and equity, against all persons interested in any way, who shall have been named as parties in the said proceedings, and against all such parties as were unknown, if notice of the order to appear and answer shall have been given by such publication or service of notice as is hereinbefore directed; and against all other persons claiming from such parties, or either of them.⁶ Such conveyances shall also be a bar against all persons having specific liens on any undivided share or interest therein, who shall have been made parties to the proceedings; but no creditor having any such specific lien, shall be affected by such sale or conveyance unless he shall have been made a party to the proceedings.⁷

¹ How. St. § 7900.

² Ibid. § 7901.

³ Ibid. § 7902.

⁴ Ibid. St. § 7903.

⁵ How. St. § 7904.

⁶ How. St. § 7905.

⁷ How. St. § 7906.

Investment of proceeds.—Where the proceeds of a sale belonging to any tenant in dower, or by the courtesy, or for life, shall be brought into court as hereinbefore directed, the court shall direct the same to be invested in permanent securities at interest, so that such interest shall annually be paid to the parties entitled to such estate during their lives respectively.¹

Money applied and invested.—Such clerk shall receive the interest or principal of any sums as they become due, and apply or reinvest the same, according to the circumstances of the case, as the court shall direct; and shall, once in every year, render to the court an account in writing, and on oath, of all moneys received by him, and of the application thereof.² All investments, or re-investments, under the provisions of this chapter, shall be made on bond and mortgage upon unincumbered real estate, of at least double the value of such investment, exclusive of buildings, or in other equivalent security; and no such security, bond, mortgage, or other evidence of such investment shall be discharged, transferred or impaired by any act of the clerk without the order of the court entered in the minutes thereof.³

Security to refund.—The court may, in its discretion, require all or any of the parties, before they shall receive any share of the moneys arising from such sales, to give security to the satisfaction of such court, to refund the said share with interest thereon, in case it shall thereafter appear that such party was not entitled thereto.⁴

Security, how taken.—When any security is directed to be taken by the court, or any investment to be made, or any security shall be taken by a master, on the sale of any real estate as hereinbefore directed, except where provisions shall be made for taking the same in the name of any known owner, the bonds, mortgages, or other evidences thereof shall be taken in the name of the clerk of the court in whose office the original bill was filed, and his successors in office, who shall hold the same by virtue of his office, and shall deliver them to his successor.⁵

¹ How. St. § 7911.

² Ibid. St. § 7914.

³ Ibid. § 7915.

⁴ Ibid. § 7912.

⁵ Ibid. § 7913.

Suits on securities.—Any person interested in such investment may, with the leave of the court, prosecute the same in the name of the existing clerk, and no suit shall be abated by the death, removal from office, or resignation of the clerk to whom such securities or evidences were executed, or of any of his successors.¹

PARTITION OF LANDS OF INFANTS AND LUNATICS.

Of infants.—Whenever it shall appear satisfactorily to the court, by due proof, or on report of a master, that any infant holds real estate in joint tenancy, or in common, or in any other manner which would authorize his being made a party to a suit in partition, and that the interest of such infant or of any other person concerned therein, requires that partition of such estate should be made, such court may direct and authorize the general guardian of such infant to agree to a division thereof, or to a sale of such premises, or of such part thereof as in the opinion of the court shall be incapable of partition, or as shall be most for the interest of such infant, to be sold.² Such guardian shall report to the court, on oath, the partition or sale so made by him, and if the same be approved and confirmed by the court, an order shall be entered authorizing such guardian to execute conveyances of the right of such infant to such part of the said estate as shall have been sold, to the purchaser thereof; or to execute releases of the rights of such infant to such part of said estate as in division falls to the shares of the other joint tenants, or tenants in common.³ Such deeds shall be as valid and effectual to convey the share and interest of such infant as if the same had been executed and duly acknowledged by such infant after arriving at full age; and in case of the sale of any part of such estate, the infant shall be deemed a ward of the court, and such order shall be taken as the court may direct, for securing, investing and applying the proceeds of the sale, and for requiring security from the guardian for that purpose.⁴ Whenever such infant shall be a married woman, the court may, upon petition, appoint her husband as her guardian, and in case of the appointment of

¹ How. St. § 7916.

³ Ibid. § 7922.

² How. St. § 7921; see *Prince v. Clark*, 81 Mich. 167.

⁴ Ibid. § 7923.

the husband the provisions of the three last preceding sections shall apply to such husband.¹

Of lunatics.—Whenever it shall appear to the court, on the application of the guardian of any idiot, lunatic, spendthrift, or person mentally incapable of managing his affairs, holding any estate in joint tenancy or in common, or in any other manner to authorize his being made a party to a suit in partition, that the interest of such idiot, lunatic, or other person aforesaid, or of any of the parties interested in such estate, requires a partition thereof, it shall be referred to a master in chancery to inquire into and report upon the circumstances.² Upon the coming in of the report, and a hearing and examination of the matter, the court may authorize such guardian to agree to a partition of such estate, and to execute releases of the right of such idiot, lunatic, or other person as aforesaid, in and to the shares of such estate falling to the other joint tenants, or tenants in common.³ Such releases shall be as valid and effectual to convey the share of such idiot, lunatic, or other person as aforesaid, as if the same had been executed by them respectively when of sound mind and understanding, and not subject to guardianship, and for a valuable consideration.⁴

SECTION VI.

HEARING AND DECREE.

Hearing.—Upon the hearing of the cause, the court shall ascertain from the proofs so taken, in case of the bill being taken as confessed, or from the bill and answer, or pleadings and proofs, if the defendants appear and answer, and shall declare the rights, titles and interests of the parties to such proceedings, complainants as well as defendants, so far as the same shall have appeared; and shall determine the rights of the said parties in such lands, and shall decree that partition be made between such of them as shall have any right therein, according to such rights.⁵ If, upon the hearing of the cause,

¹ How. St. § 7924.

² Ibid. § 7925.

³ Ibid. § 7926.

⁴ Ibid. § 7927.

⁵ How. St. § 7869; *Shephard v. Rice*, 38 Mich. 556; *Hoffman v. Beard*, 22 Mich. 69.

the part or interest of any parties who shall not have appeared and answered the bill, whether known or unknown, in and to such premises, shall not have appeared by the proofs in the cause, then the court shall decree that partition be made, so far as the rights or interests of the parties who are known, and who have appeared in the cause, have been ascertained, and the residue of the premises shall remain for the parties whose interests have not been ascertained, subject to division between them at any future time.¹

Owely.—Whenever partition shall be decreed by any Circuit Court, if it shall appear that it can not be made equal between the parties, without prejudice to the rights and interests of some of them, the court may decree compensation to be made by one party to the other, for equality of partition according to the equity of the case.²

Costs.—When a decree confirming the partition made by any commissioners, shall be entered as provided in this chapter, the court shall also adjudge and decree that each of the parties concerned therein, other than the complainants, pay to such complainants a proportion of the costs and charges of the proceedings, to be ascertained by the court, according to the respective rights of the parties, and the proportion of such costs and charges assessed upon the unknown owners, to be chargeable on the part remaining undivided; and upon such decree, execution may issue as in other cases, and may be levied on the property of the parties respectively charged with such costs, and upon any share or part of the premises allotted on any such division to any owner unknown, or not named, and upon every portion remaining undivided, for the proportion adjudged to be paid by such owners, or chargeable to the part remaining undivided.³ A sale of the premises of such owner unknown, upon such execution, shall be as valid as if such owner had been named in the proceedings, and in such execution.⁴ If a bill for partition shall be dismissed, or the suit shall be discontinued, the complainants shall pay the costs, to be collected as in other cases.⁵

¹ How. St. § 7870.

⁴ Ibid. § 7918.

² Ibid. § 7931.

⁵ Ibid. § 7919.

³ Ibid. § 7917; *Shephard v. Rice*,
38 Mich. 556.

Receiver.—Whenever it shall appear that it would be beneficial to any part owner of the premises of which partition is sought, that the same should be leased or protected from waste, trespasses or injury, or for any other purpose, it shall be competent for the court to appoint a receiver thereof, with such authority as may be necessary in the premises.¹

Appeal.—Any of the parties to a suit for the partition or sale of any premises under the provisions of this chapter, and any party interested in the premises, though not named in the proceedings, may, jointly or separately, and without the consent of any co-complainant or co-defendant, appeal from any decree or order of the said court, upon any such proceedings, within the same time, and under the like regulations, as in other cases.²

Voluntary partition.—A tenant in common may enter into such agreement with his co-tenant as to estop himself from enforcing his right to a partition.³

After the division of an estate by the heirs thereto has been acquiesced in for twenty years, a bill for partition will not lie in behalf of one of the heirs to disturb it.⁴

If heirs have attempted to partition among themselves voluntarily, with the exception of one who files his bill for partition, the court will respect and adhere to the voluntary partition, so far as it does not interfere with the rights of the complainant.⁵ And in case of voluntary partition of land, any liens upon the undivided interest of either tenant in common will, by analogy to a partition made under the statute, be transferred as between the parties to that portion of the premises by such partition set off to such tenant, and such portion will become the primary security for such lien.⁶

Incumbrances—Improvements.—Where an incumbrance has been paid off by one tenant in common, he has a lien therefor, and his rights will be protected by the court.⁷

In estimating the complainant's share of the incumbrance it is not necessary to notice particularly the other shares of land

¹ How. St. § 7936.

² Ibid. § 7920.

³ *Eberts v. Fisher*, 54 Mich. 294;
Avery v. Paine, 12 Mich. 540.

⁴ *Mitchell v. Mitchell*, 68 Mich. 106.

⁵ *Campau v. Campau*, 19 Mich. 116.

⁶ *Webb v. Rone*, 35 Mich. 58.

⁷ *Titsworth v. Stout*, 49 Ill. 78.

held in fee, but as between the owners of the fee and of a life estate in the same incumbered property, the life estate should keep down the interest as its share of the incumbrance, and the fee should be charged with the principal.¹

If a portion of the premises has been improved by a co-tenant, that portion should be set off to him if practicable, without taking into consideration the value of the improvements.²

Compensation for improvements will not be allowed to a defendant whose long use of the land offsets such improvements.³

Rents and profits.—The statute provides that one tenant in common may maintain an action against his co-tenant for receiving more than his just proportion of the rents and profits,⁴ but in the absence of any agreement to pay, one tenant in common can not maintain an action against another for the value of the use of his interest in the land.⁵

Where one tenant in common who enters into possession of the joint property for all of the owners under an express agreement that it is to be used for the benefit of all, converts such possession to his sole use, he will be liable to account for the value of such use.⁶

The decree in an action for partition and an accounting may include rents and profits accruing pending suit.⁷

Opening decree.—A decree of partition can not be opened to change results without setting aside the titles under it. Parties can not claim under a decree of partition, and at the same time strive to avoid or open it.⁸ The two positions are inconsistent. Our Supreme Court has decided that our statute of partition, having been adopted in substance from that of New York, the construction given it by the courts of that State at the time of its adoption by our legislature, will be followed by our courts.⁹

¹ *Campbell v. Campbell*, 21 Mich. 454, and cases there cited.

² *Dean v. O'Meara*, 47 Ill. 120; see *Kurtz v. Hibner*, 55 Ill. 514.

³ *Pierson v. Conley*, 95 Mich. 619; *Campbell v. Campbell*, 21 Mich. 438.

⁴ How, St. § 5773; Comp. Laws, § 4308.

⁵ *Everts v. Beach*, 31 Mich. 136; *Wilmoth v. Palmer*, 34 Mich. 347; *Davis v. Filer*, 40 Mich. 316.

⁶ *Pierce v. Pierce*, 89 Mich. 233; *Fuller v. Sweet*, 30 Mich. 237.

⁷ *Hunt v. Hunt*, 109 Mich. 399.

⁸ *Walsh v. Varney*, 38 Mich. 73.

⁹ *Greiner v. Klein*, 28 Mich. 12.

No. 186. Decree for partition.

(Caption, and title of cause as in No. 97, ante, page 179.)

This cause having come on to be heard upon the bill of complaint herein, the answer of the defendants thereto, and the replication of the complainant to such answer, and the report of the circuit court commissioner, to whom this cause was heretofore referred to take the proofs therein, which said report is hereby approved and confirmed by the court; and the court having heard the arguments of counsel for the respective parties, and being fully advised in the premises, doth find, that, etc. (*Here insert the finding of the court, as set out in the bill*), and that the allegations in the bill contained are true; and that partition and division ought to be made as therein prayed.

It is therefore *ordered, adjudged and decreed*, by the court, that the complainant, A B, and the defendant, D B, are each entitled to one-half of the said premises, to wit (*here describe the land*): subject to the dower of the said C B, widow of the said B B, deceased, in fee simple; and that a division and partition of said premises be made; and that E F, G H and L M, of etc., neither of whom appear to be connected with any of the parties by consanguinity or affinity, and who are entirely disinterested, be and they are hereby appointed commissioners to make partition of said premises; that each of said commissioners take and subscribe an oath or affirmation, as required by law, to honestly and impartially execute the trust reposed in them, make partition of the said premises, according to the rights and interests of the parties, as directed by this court, and a true report make to the court; that the said commissioners shall go upon the premises, and if the same are susceptible of division, they shall make partition thereof, allotting the several shares to the respective parties, quality and quantity relatively considered, according to their respective rights and interests as hereby adjudged, designating the respective shares by posts, stones and other permanent monuments, and that if necessary they employ a surveyor with necessary assistants, to aid therein; and if the premises are not susceptible of division, without manifest prejudice to the parties in interest, they shall value each piece or parcel separately; and that they report their actings and doings in the premises, under their hands and seals, to the court, as soon as practicable.

No. 187. Report of commissioners making partition, etc.

STATE OF MICHIGAN.

The Circuit Court for the County of ———. In Chancery.

A B et al.,	}
Complainants,	
vs.	
C D et al.	}
Defendants.	

To the Circuit Court for the County of ———. In Chancery.

In pursuance of a decree rendered in the above entitled cause, on, etc., we, the commissioners therein named, respectfully report to the court, that, after each of us having taken and subscribed an oath (*or affirmation*), honestly and impartially to execute the trust reposed in us, and make partition as directed by the court, which said oath is hereto attached for greater certainty, we went upon the premises described in said decree

to wit (*here describe the premises*), * and made partition thereof, allotting the several shares to the respective parties, quality and quantity relatively considered, according to their respective rights and interests as declared by the judgment of the court in said decree; that is to say, we set off and allotted to A. B. in severalty, for his interest and share of said premises, being the — part thereof, according to the relative value thereof, the following, to wit (*here describe the part so allotted by metes and bounds, or other proper description*); and to the said C. D., etc. (*Here set out the same as in the last, and so proceed with each share.*)

And we would further report, that we employed R. S., a surveyor, with necessary assistants to aid therein, in making such partition, and that the items of the various expenses attending the execution of the said decree, including our fees, are contained in a schedule hereto annexed marked "A," and forming a part of this our report. And that for the better understanding and more clear elucidation of the shape and situation of the said premises, and of the manner in which such partition has been made by us, we have caused to be made a map thereof, showing what parts of the said premises have been allotted to the respective parties, which map forms a part of this our report, and is hereto attached, marked "Exhibit B."

All of which is respectfully submitted for the approval of the court.

In witness whereof, we, the said commissioners, have set our hands and seals to this our report, this — day of —, in the year 18—.

B. A. [L. S.]

D. C. [L. S.]

F. E. [L. S.]

(*Attach the oath, schedule A, and exhibit B.*)

No. 188. Form of oath.

STATE OF MICHIGAN.

The Circuit Court for the County of ——. In Chancery.

A. B. et al.	}
Complainants,	
vs.	
C. D. et al.	
Defendants.	

STATE OF MICHIGAN, } ss.
County of ——. }

I do solemnly swear that I will honestly and impartially execute the trust reposed in me, and make partition of the premises mentioned in the decree rendered by the court in the above entitled cause, as directed by the court, so help me God.

Subscribed and sworn, etc.

B. A.

D. C.

F. E.

No. 189. Report of commissioners that the premises are not susceptible of division.

(*Proceed as in form No. 187 to the asterisk,* and then*) And upon examination thereof, we determined, and so report to the court, that the said premises, and each piece or parcel thereof, are not susceptible of division without manifest prejudice to the parties in interest.

And we would further report that the items of the various expenses attending the execution of the said decree, including our fees, are contained in a schedule hereto annexed, marked "A," and forming a part of this our report.

All of which is respectfully submitted.

In witness whereof, we, the commissioners, have set our hands and seals to this our report, this — day of —, in the year 18—.

B A. [L.S.]

D C. [L.S.]

F E. [L.S.]

(Attach oath and schedule A.)

No. 190. Decree confirming report of commissioners.

(Caption and title of cause as in No. 97, ante, page 179.)

This day came B A, D C, and F E, commissioners appointed by the court to make partition of the lands in a former decree mentioned, between the parties thereto, and made report of their proceedings, and that they had made partition as in and by said decree they were required; and the court having examined the same, doth find that the said commissioners have, in every respect, proceeded according to law, and the judgment of the court in said decree declared, and have honestly and impartially executed the trust reposed in them, and that said partition was honestly and impartially made; and no objections or exceptions being made by any of the parties herein thereto, and the court being fully advised in the premises: it is ordered, adjudged and decreed that the proceedings, partition and report of said commissioners be, and the same are hereby approved and confirmed, and that the said parties hold in severalty the shares set off and assigned to each, respectively, by the said commissioners, and that the title to the shares set off and assigned by said commissioners to each of said parties, respectively, be, and the same is hereby vested in the said parties, respectively, according to said assignment.

And it is further ordered that the report of said commission be spread at large upon the records of this court.

And it is further ordered that the costs and expenses of this proceeding be paid within — days by the parties, in the following proportions, to wit: That, etc. (*here set out the proportions each party is required to pay*); and that the same be paid within — days from this date, and in default thereof, that execution issue therefor.

It is held in Illinois, that on filing of the report of the commissioners in partition, either party may file exceptions thereto, and the court will hear evidence in support and against such report, and approve or disapprove of the same, as the facts may justify. And inequality of value, as well as inequality in quantity, is held to be a good cause for setting aside a report of commissioners; and, upon the hearing of such exceptions, the facts may be shown by affidavit.¹

¹ *Riggs v. Dickinson*, 2 Scam. 438.

*No. 191. Decree for sale of premises.**(Caption and title of cause, as in No. 97, ante, page 179.)*

This day came again the complainants by L M, their solicitor, and W A L, appearing for the defendants, and the said B A, D C and F E, commissioners, heretofore appointed herein by the court to make partition of the premises hereinafter mentioned, having made report that the same are so circumstanced that a division thereof can not be made without manifest prejudice to the parties interested; and the court having examined said report, doth find that said commissioners have, in all respects, proceeded in accordance with the law and the terms of the decree under which they were appointed; and the court being fully advised in the premises, doth order, adjudge and decree that the proceedings of said commissioners and their report be, and the same are hereby approved and confirmed; and thereupon, this cause coming on to be heard upon the report of said commissioners, and the court having heard the arguments of counsel, and being fully advised in the premises, and on consideration thereof, *doth order, adjudge and decree* that the said premises, to wit (*here describe the premises*), be sold at public auction, at, etc., to the highest and best bidder, provided the said bid upon each piece or parcel shall be equal to at least two-thirds of the valuation put upon the same, as shown by the report of the commissioners heretofore appointed by the court to make partition thereof, which said sale shall be made on the following terms (*here set out the terms of sale*): That S W O, a commissioner of this court be, and he is hereby directed to make said sale, and to carry into effect this decree. The said commissioner will first give public notice of such sale, and the time, place and terms thereof, by (*then insert the manner of advertising and publishing notice of sale, which is the same as that required by law on sales of real estate on execution, by sheriffs, and conclude with such further directions as to the court seems proper and the statute requires.*)

It has also been held in Illinois, that upon the master's making report of sale, exceptions may be taken, and if it appears that the requirements of the statute or decree of sale have not been complied with, or any other sufficient ground appears, the court will set the sale aside. And some proof, independent of the assertion of the master or commissioner making the sale, must be made that public notice was given of a sale of land in partition, otherwise the sale will not be confirmed.¹ This would seem to be the correct practice under our statute.

*No. 192. Decree confirming sale in partition.**(Caption and title of cause as in No. 97, ante, page 179.)*

This day came the Circuit Court commissioner, appointed by a former decree of the court, herein, to make sale and to carry into effect said former

¹ *Tibbs v. Allen*, 29 Ill. 535; see *Dunning v. Dunning*, 37 Ill. 306; *Comstock v. Purple*, 49 Ill. 158.

decree, and made report of his proceedings; and the court having examined the same, doth find that the said commissioner has in every respect proceeded in due form of law, and in accordance with the terms of said decree, and that said sale was fairly made; and the court being fully advised in the premises, doth order, adjudge and decree that the proceedings, sale and report of said commissioner be, and the same are hereby approved and confirmed; and it is further ordered that the said commissioner execute and deliver to the said O M, the purchaser at said sale, proper conveyances of the premises so sold; and that out of the proceeds of said sale, he pay first the costs and charges of this proceeding, and that the said commissioner distribute the residue of said moneys between the said parties in the following proportions, to wit : To the said A B, —— dollars; to C D, —— dollars; to, etc., etc.

CHAPTER XXXII.

BILL TO PROBATE FOREIGN WILL.

Section 1. WHEN ALLOWED.

2. PARTIES.
3. BILL AND ANSWER.
4. COMMISSION TO TAKE TESTIMONY.
5. DECREE AND ITS EFFECT.

SECTION I.

WHEN ALLOWED.

Whenever it shall become necessary to make probate in this State, of the last will of any deceased person, which was executed in a foreign country, by the laws of which no probate of wills, after the death of the maker, is required or provided for, if the original will can not be produced in this State for probate, the same may be proved and allowed in this State, by a full and complete copy thereof, in the Circuit Court in chancery, in and for any county in which the maker of such will left any property, at his or her decease, affected by such will.¹

SECTION II.

PARTIES.

Any person interested in the proof and allowance of any such foreign will, whether as executor, heir, devisee, legatee or otherwise, may file in any such Circuit Court in chancery, a bill or petition, for the probate of such will.² All proper persons must be made parties to the suit. All persons interested in the probate of the will, must be joined either as complainants or defendants.³

¹Laws 1881, p. 85; How. St. § 5826.

²Laws 1881, p. 85; How. St. § 5827; *Matter of Easton's Will*, 6

³Laws, 1881, p. 85; Ibid. § 5827. Paige, 183.

SECTION III.

THE BILL AND ANSWER.

The bill or petition must set forth clearly, all the facts necessary to give the court jurisdiction. The bill should state the interest of the complainant, under the will sought to be probated; the decease of the testator; the time and manner of the execution of the will; the fact that it was executed in a *foreign* country, naming the same; that it was executed according to the laws of such country; that by the laws of such country, no probate of wills, after the death of the maker, is required or provided for; that the original will can not be produced for probate in this State, and that the deceased left property in the country where the bill is filed.

A copy of the will should be set forth in the bill of complaint; and the bill should pray that an order be granted directing the will to be proved in a court of chancery, upon a commission to be issued (or letters rogatory), directed to certain commissioners named therein, to take the testimony of proper persons to prove said will.¹

No. 193. Bill to probate a foreign will.

STATE OF MICHIGAN.

The Circuit Court for the County of ———. In Chancery.

To the Circuit Court for the County of ———. In Chancery.

1. Your orator, A B, of the township of ———, in said county, respectfully represents unto the court that he is of the age of twenty-one years and upwards, and that he is the son of C D, deceased, who lately departed this life at the township of ———, county and State aforesaid, on the ——— day of ———, A. D. 18—, at the age of — years.

2. Your orator further represents that the said C D, deceased, died leaving property in the said county of ——— aforesaid, which said property consisted of (*here describe the property*) and was of the value of ——— dollars, as near as your orator can estimate the same.

3. Your orator further represents that the only heir at law and legatee of said C D, deceased, at present living, is E F, the brother of your orator, who resides at the township of ———, county of ———, and State aforesaid. And your orator shows that by the terms of the will of said C D, deceased, as hereinafter fully set forth, the said C D left all of his property, both real and personal and of every name and nature, to your orator and his said brother E F.

¹ Laws 1881, p. 85; How. St. § 5828.

4. Your orator further represents that the said C D, deceased, died leaving a will executed upon the — day of —, A. D. 18—, which said will was executed in the city of — in —, said — being a foreign country.

5. Your orator further represents, that the said will of said C D, deceased, so executed in said foreign country aforesaid, was fully executed in accordance with the laws of said foreign country, and in each and every particular thereof. Your orator further shows, that by the laws of said foreign country no probate of wills, after the death of the maker, is required or provided for.

6. Your orator represents unto the court, that the original will of said C D, deceased, so executed as aforesaid, can not be produced in this State for probate, for the following reasons: *(Here insert such reasons as may exist why it can not be done.)*

7. Your orator further represents to the court, that the property of said C D, deceased, hereinbefore set forth and described, and which is located in this said — county, and was at the time of the decease of said C D, is affected by the terms of said will, the same being distributed in certain proportions, as will hereinafter appear to your orator and his said brother, said E. F.

8. Your orator further represents unto the court, that the will herein mentioned of said C D, deceased, is in words and figures, as follows, that is to say: *(Here insert copy of the will, if the same can be done, and if it can not be done, state fully the reason why.)*

9. Your orator further shows unto the court, that, as appears by the copy of said will as aforesaid, your orator is named as executor of said will, and that the only persons interested, in any manner, in the proof or allowance of said will, are your orator and his said brother, E F.

10. Your orator further represents, that the said E F sometimes claims and pretends that the said C D, deceased, left no last will and testament; and at other times claims and insists that the foregoing copy of the last will and testament of said C D, deceased, is not a copy of any will left by said C D, or executed by him in his lifetime, and the said E F therefore refuses to join with your orator in praying probate of said will. Whereas, in truth and in fact, the contrary is true, and the said C D, deceased, did leave a last will and testament, a true and correct copy of which is hereinbefore fully set forth.

All which actings, doings and pretenses of the said defendant, E F, are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of your orator in the premises. In consideration whereof your orator prays:

I. That the said C D may, without oath *(his answer on oath being hereby waived)*, full, true and perfect answer make to this your orator's bill of complaint.

II. That a commission, or letters rogatory, may be issued out of and under the seal of this court, directed to certain persons therein to be named, and authorizing them and each of them to take the testimony of *(Here insert the names and residences of witnesses whose testimony is required to establish the will.)*

III. That this honorable court may admit said will to probate, or so much thereof as may be valid in this State.

IV. And that your orator may have such other relief and such further relief as shall be agreeable to equity and good conscience.

May it please the court (*Add prayer for process*).

F E.

D B.,
Solicitor for complainant.

The proceedings, issuing process, etc., to bring the defendant before the court, are the same in this class of cases as are provided for in the court of chancery in other causes.¹

Defenses—Practice.—The defendant may plead, answer or demur as in other cases in chancery. Under the statute which we are now considering, all the proceedings, unless otherwise provided, must conform to the rules and practice of the Circuit Court in chancery. The proceeding is purely statutory, and all the provisions of the statute must be closely and carefully followed.

SECTION IV.

COMMISSION TO TAKE TESTIMONY.

The court has full power, by means of commissions or letters rogatory, to take the testimony of any officer, magistrate or other persons having custody or possession of the original will, of the witnesses thereto, and of any other person whose testimony is required.

Upon the appearance of the defendant being entered in the cause, the complainant may serve upon him a notice of a special motion, for an order from the court granting a commission or letters rogatory, in conformity with the prayer of the bill. The commission should be in the usual form for examining witnesses residing out of the State, and it should be executed in like manner. The same proceedings as are required by the rules in other cases, should be had in settling interrogatories,² and if the defendant appears in the case he can join in the commission.

If the defendant does not appear and the bill is taken as confessed, then it would seem that the complainant would be entitled to an order of course, granting a commission or letters rogatory.

¹ How. St. § 5830.

² *Ante*, pp. 155-61.

If the defendant appears, he should have, it is said, reasonable notice of the time and place of executing the commission.¹

The general law of the foreign country where the will was executed, concerning the execution and probate of will, should be proven, as well as all other requirements of the statute.²

SECTION V.

DECREE AND ITS EFFECT.

If, upon the proofs of the case, a full and complete copy of the will sought to be probated is shown, and it shall sufficiently appear that the alleged will is valid, and sufficient to pass any of the property, real or personal, of the maker within this State, that said will was executed in a foreign country, that the maker is dead, and that the original will is retained in a foreign country, and can not be produced in this State for probate, and that the laws of said foreign country do not require or provide for the probate of said will after the death of the maker, it shall then be lawful for the court to admit such will to probate, or so much thereof as it shall find to be valid in this State.³

Effect of probate.—Such allowance and probate shall have the same effect as if the same had been made in any probate court of this State, of lawful jurisdiction, upon production and proof of the original will.⁴

Transcript to be filed in Probate Court.—Any probate made as aforesaid, with a transcript of the will proven and allowed, shall be certified to and filed with the Probate Court of the county in which probate has been made, and thereupon said Probate Court shall have the same power and jurisdiction in respect to the estate of the deceased, as if said will had been proven and allowed in said Probate Court.⁵

Appeal.—An appeal to the Supreme Court may be taken as in other cases.⁶

¹ Matter of Atkinson, 2 Paige, 214.

² Matter of Roberts' Will, 8 Paige, 446.

³ Laws 1881, p. 85; How. St. § 5828.

⁴ Laws 1881, p. 85; Ibid. § 5828.

⁵ Laws 1881, p. 85; Ibid. § 5829.

⁶ Laws 1881, p. 85; Ibid. § 5830.

CHAPTER XXXIII.

BILLS FOR DIVORCE.

- Section 1. NATURE OF.
2. CAUSES FOR DIVORCE.
 3. JURISDICTION OF, AND WHERE COMMENCED.
 4. PARTIES TO.
 5. BILL, FRAME OF.
 6. NATURAL IMPOTENCY.
 7. ADULTERY.
 8. CONVICTION OF CRIME.
 9. DESERTION FOR TWO YEARS.
 10. HABITUAL DRUNKENNESS.
 11. EXTREME CRUELTY.
 12. FAILURE TO SUPPORT.
 13. DIVORCES GRANTED IN ANOTHER STATE.
 14. SUIT TO ANNUL MARRIAGE.
 15. SUIT TO AFFIRM MARRIAGE.
 16. VOID MARRIAGES.
 17. REFERENCE TO TAKE PROOF.
 18. INJUNCTIONS IN.
 19. DEFENSES.
 20. HEARING AND DECREE.
 21. ALIMONY.

SECTION I.

NATURE OF.

A divorce is the dissolution of a marriage contracted between a man and a woman, by the judgment of a court of competent jurisdiction, or by an act of the legislature. It is so called from the diversity of the minds of those who are married, because such as are divorced go each a different way from the other.¹ Until a decree of divorce be actually made, neither party can treat the other as sole, even in cases where the marriage is utterly null and void for some pre-existing

¹ Redly's Civ. and Eccl. L. pp. 11, 112; Bouv. L. D. 439.

cause.¹ A decree of divorce must also be made during the lifetime of both parties. After the decease of either the marriage will be deemed legal in all respects.²

Divorces are of two kinds: *First, á vinculo matrimonii*—a total severance of the marriage tie; and *second, á mensa et thoro*—"from bed and board"—which merely separates the parties.

The divorce *á vinculo matrimonii* was never granted by the ecclesiastical law, except for the most grave reasons. These, according to Lord Coke, are *causa procontractus, causa metus, causa impotentiae seu fridigitatis, causa affinitatis, et causa consanguinitatis*—on account of precontract, fear, impotence or frigidity, affinity or consanguinity.³ In England, such a divorce bastardizes the issue, and, generally speaking, is allowed only on the ground of some pre-existing cause;⁴ but sometimes by an act of parliament for a supervenient cause.⁵ When the marriage was dissolved for canonical causes of impediment, existing previous to its taking place, it was declared void *ab initio*.

In some of the States of the Union divorces *á vinculo* are granted by the State legislatures for such causes as may be sufficient to induce the members to vote in favor of granting them; and they are granted by the courts to which such jurisdiction is given, for certain causes particularly provided for by law. In some States the legislature never grants a divorce until after the courts have decreed one. This is still the case in Mississippi. In Wisconsin the Constitution prohibits the legislature from granting divorces. In Michigan the legislature can not grant a divorce.⁶

SECTION II.

CAUSES FOR DIVORCE.

The statutes of the different States vary as to the causes of divorce.

In Michigan the statute provides⁷ that a divorce may be

¹ 3 Penn. Law Journal, 151, 153.

² Reeves' Dom. Rel. 204; 1 Black. Com. 440; Bouv. L. D. 439.

³ Co. Litt. 235a.

⁴ Reeves' Dom. Rel. 204, 205.

⁵ 1 Black. Com. 440; Bouv. L. D. 440.

⁶ *Taft v. Taft*, 3 Mich. 67; Const. Art. IV, § 26.

⁷ How. St., § 6228; *People v. McCaffery*, 75 Mich. 123.

decreed by the court of chancery on application by bill or petition, by the aggrieved party, in either of the following cases :

1. Whenever adultery has been committed by any husband or wife.

2. When one of the parties was physically incompetent at the time of the marriage.

3. When one of the parties has been sentenced to imprisonment in any prison, jail, or house of correction for three years or more; and no pardon granted to the party so sentenced after a divorce for that cause, shall restore such party to his or her conjugal rights.

4. When either party shall desert the other for a term of two years.

5. When the husband or wife shall have become an habitual drunkard. .

6. And the Circuit Courts may, in their discretion, upon application as in other cases, divorce from the bonds of matrimony any party who is a resident of this State, and whose husband or wife shall have obtained a divorce in any other State.

7. A divorce from bed and board forever, or for a limited time, may be decreed for the cause of extreme cruelty, whether practiced by using personal violence or by any other means, or for utter desertion by either of the parties for the term of two years; and a like divorce may be decreed on the complaint of the wife, when the husband being of sufficient ability to provide a suitable maintenance for her, shall grossly or wantonly and cruelly refuse or neglect so to do.¹

8. A divorce from the bond of matrimony may be decreed for either of the causes mentioned in the preceding section, whenever in the opinion of the court the circumstances of the case will be such that it will be discreet and proper so to do.²

Incompatibility of temper.—Incompatibility of temper is not a legal cause for divorce. The marriage relation should not be considered as a garment to be worn or cast aside at pleasure. The stability of the State, the welfare of society, the sanctity of the home, demand that it should not be dissolved for light and transient causes, nor unless the charges

¹ How. St. § 6229.

² Ibid. § 6230.

made in the bill are satisfactorily established by the testimony, and the party applying is free from blame as to the procuring cause.¹

SECTION III.

JURISDICTION OF, AND WHERE COMMENCED.

The suit must be commenced in the Circuit Court of the county where the parties or one of them reside.² But no divorce can be granted unless the complainant shall have resided in the State one year immediately preceding the time of filing the bill, or unless the parties were married in this State, and the complainant shall have resided in the State from the time of such marriage until the time of bringing the suit; and when the causes for divorce shall have occurred out of the State, no decree of divorce will be granted unless the complainant or defendant, or both of them, shall have resided in the State for two years immediately preceding the filing of the bill. No decree will be granted in any case except when the defendant is domiciled in this State at the time the bill is filed or unless the defendant shall have been domiciled in the State when the cause of divorce arose, or when the defendant shall have been brought in by publication or shall have been personally served with process in the State, or shall have been personally served with a copy of the order for appearance and publication within this State or elsewhere. When the defendant in any case for divorce shall not be domiciled in this State at the time of the commencement of the suit, or shall not have been domiciled therein at the time the cause for divorce arose, before any decree of divorce will be granted the complainant must prove that the parties have actually lived and cohabited together as husband and wife within the State, or that the complainant has in good faith resided in the State for two years immediately preceding the filing of the bill.³

Proof of service of order for appearance.—Whenever any order for appearance is served outside the State, proof of such service must be made by the affidavit of the person who shall serve the same, made before a justice of the peace or notary public, and when such affidavit is made outside the State it

¹ *Morrison v. Morrison*, 64 Mich. 53.

² How. Stat. § 6228.

³ Public Acts 1897, p. 126.

must have attached thereto the certificate of the clerk of a court of record, certifying to the official character of the justice or notary, and the genuineness of his signature to the jurat of the affidavit. (Public Acts 1897, p. 126.)

Residence where ground is desertion.—In all cases where a divorce is asked on the ground of desertion, such desertion will be deemed to have occurred and taken place in this State for the purposes of the Divorce Act, when the parties complainant and defendant shall have been actually and in good faith domiciled in the State at the time the defendant actually abandoned the complainant, without proof of his or her actual intent at the time of such abandonment. (Public Acts 1897, p. 126.)

SECTION IV.

PARTIES TO.

The bill may be exhibited in the name of the wife, when she is complainant, as well as in the name of the husband when he is the complainant.¹ Under our practice, the only parties to a divorce suit are the husband and wife. When insanity or idiocy is alleged as a reason to annul a marriage, the suit is prosecuted by any person admitted by the court to prosecute as the next friend of such idiot or lunatic.² A suit to annul marriage for physical incompetency at the time of the marriage, can only be maintained by the injured party, and against the person who is claimed to be physically incompetent.³ And in such case, the suit must be brought within two years from the date of the marriage.⁴ The statute also provides that a lunatic, after his reason is restored, may bring suit to dissolve a marriage between himself and wife;⁵ and it also provides that a bill to annul a marriage upon the ground that one of the parties was under the age of legal consent, may be exhibited by the parent or guardian entitled to the custody of the minor. The party who was of the age of legal consent when the marriage ceremony was performed can not make the application.⁶

¹ Comp. L. 1871, § 4743; How. St. § 6233.

² Comp. L. 1871, § 4766; How. St. § 6255.

³ Comp. L. 1871, § 4771; How. St. § 6259.

⁴ Ibid. § 6259.

⁵ Comp. Laws 1871, § 4768; How. St. § 6256.

⁶ Comp. Laws 1871, § 4766; How. St. § 6254; *People v. Slack*, 15 Mich. 201.

SECTION V.

BILL, FRAME OF.

The general principles applicable to a bill in chancery apply to bills for divorce.¹ It will not be necessary, therefore, to enter largely into the discussion of this subject.

All divorce bills must be verified.² All amendments to divorce bills must be verified, and the whole bill is required to be resworn to.³ But the answer is not required to be under oath,⁴ unless the defendant incorporates in his answer a prayer for affirmative relief in the nature of a cross-bill, when it must be verified,⁵ and it may be done by amendment before decree.⁶

The rules provide,⁷ that in all bills filed for divorce upon the ground of adultery, the complainant must positively aver that the adultery charged in the bill was committed without the consent, connivance, privity or procurement of the complainant; and that the complainant has not voluntarily cohabited with the defendant since the discovery of such adultery. And in all such bills, and in all bills for divorce upon any ground, the complainant shall also positively aver that the act done or cause charged in the bill for which divorce is sought, was committed without the consent, connivance, privity or procurement of the complainant, and that such bill is not founded on or exhibited in consequence of any collusion, agreement or understanding whatever between the parties thereto, or between the complainant and any other person.

We shall consider the several grounds for divorce in Michigan, separately, under various sections, and will then speak more particularly of the essentials of a bill.

Frame of bill—Names and ages of children, etc.—Every bill of complaint filed shall set forth the names and ages of all

¹ See Chap. III.

² Chancery Rule 29a.

³ *Briggs v. Briggs*, 20 Mich. 34; *Green v. Green*, 26 Mich. 437. But see *Tuckaberry v. Tuckaberry*, 101 Mich. 104.

⁴ Comp. L. 1871, § 4743; How. St. § 6233.

⁵ Chan. Rule 11a; Chan. Rule 29a; How. St. Sup. § 6232.

⁶ *Harrison v. Harrison*, 94 Mich. 559.

⁷ Chancery Rule 29a; *People v. McCaffray*, 75 Mich. 123.

children of the marriage, and when there are children under fourteen years of age a copy of *subpœna* issued in the cause shall be served upon the prosecuting attorney of the county where suit is commenced, and it shall be the duty of said prosecuting attorney to enter his appearance in said cause, and when, in his judgment, the interest of said children or the public good so require, he shall introduce evidence, and appear at the hearing and oppose the granting of a decree of divorce. For every case which the prosecuting attorney contests by and with the consent of the court he shall receive the sum of five dollars, to be paid by the county treasurer upon the certificate of the circuit judge that such services have been performed: *Provided*, that nothing in this act contained shall be construed as preventing prosecuting attorneys or their partners from acting as solicitors or counsel for either party to the suit. And in case a prosecuting attorney shall be in any way interested as solicitor or counsel for either of said parties, it shall be the duty of the court to appoint some reputable attorney to perform the services of prosecuting attorney, as provided in this act, who shall receive the compensation provided for such service.¹

Residence of complainant.—The residence of one of the parties to a bill for divorce in the county where the suit is brought is essential to granting the relief sought, but the omission of such averment from the bill may be cured by amendment.²

Collusion—Oath of complainant.—No divorce shall be decreed in any case when it shall appear that the petition or bill therefor was founded in or exhibited by collusion between the parties; and the oath or affirmation administered to the complainant in swearing to such petition or bill shall, in addition to all other legal requirements, recite the following: "And you do solemnly swear (or affirm), that there is no collusion, understanding or agreement whatever between yourself and the defendant herein in relation to your application for divorce." And no divorce shall be decreed in any case where the party complaining shall be guilty of the same crime or misconduct charged against the respondent.³

¹ How. Stat. Sup. § 6263b; *Wilcox v. Wayne*, etc., 83 Mich. 1.

² *People v. McCaffrey*, 75 Mich. 115.

³ How. St. Sup. § 6232; see *Thompson v. Thompson*, 70 Mich. 62; *Reed v. Reed*, 86 Mich. 600; *Warner v.*

This requirement of the statute is mandatory and its absence can not be waived.¹

But where an answer in the nature of a cross-bill lacks verification it may be amended before decree.²

The objection that the oath of non-collusion is not in strict conformity with the statute can not be raised for the first time in the Supreme Court.³

SECTION VI.

NATURAL IMPOTENCY AT TIME OF MARRIAGE.

We have seen that among the grounds of divorce enumerated by the statute, is that one of the parties was physically incompetent at the time of the marriage.⁴

It has always been deemed requisite to the entire validity of every marriage, not only that the parties should be of different sex, but that they shall be essentially complete in their several organizations and capabilities. "As the first cause and reason of matrimony," says Ayliffe, "ought to be the design of having offspring; so the second ought to be the avoiding of fornication."⁵ And the law recognizes these two "as the principal ends of matrimony," namely, "a lawful indulgence of the passions to prevent licentiousness, and the procreation of children, according to the evident design of Divine Providence."⁶

When one knowingly marries another who is past the age of procreation, he can not complain on the ground of unfruitfulness.⁷ If the party married be within that age, and have the power of copulation, there is, ordinarily, no means of certainly determining that at the time of the marriage an incur-

Warner, 54 Mich. 494; *Holcomb v. Holcomb*, 100 Mich. 421; *Hoff v. Hoff*, 48 Mich. 281; *Friend v. Friend*, 53 Mich. 543; *Morrison v. Morrison*, 64 Mich. 53; *Minde v. Minde*, 65 Mich. 633; *Peck v. Peck*, 66 Mich. 586; *Sissung v. Sissung*, 65 Mich. 129.

¹ *Ayres v. Wayne Judge*, 90 Mich. 380.

² *Harrison v. Harrison*, 94 Mich.

559; *Daly v. Hosmer*, 102 Mich. 392.

³ *Holcomb v. Holcomb*, 100 Mich. 421.

⁴ How. St. § 6228.

⁵ Ayl. Parer. 360.

⁶ 1 Robert, 279; 3 Phill. 325; 1 Eng. Eccl. R. 403, 409.

⁷ *Brown v. Brown*, 1 Hagg. 523, 3 Eng. Eccl. R. 229.

able sterility existed. Indeed, medical writers have stated without qualification, that there is no such means,¹ which is probably true, wherever there is no discoverable malformation. In all the reported cases, therefore, the principal inquiry has been as to the ability to copulate, and when, from any cause which is irremediable, there is an inability, the object of the marriage is frustrated.²

Every marriage contract implies a capacity in the parties of consummation.³ When a person, knowing his own defect, induces another, who is ignorant of it, to marry him, he commits a gross fraud and a grievous injury;⁴ and when he is himself ignorant of it, there is equally a violation of the contract, and an equal injury, though there be no intentional wrong. In the former case, the marriage would be clearly voidable on the single ground of fraud, if the principles which govern ordinary contracts were to be applied to it; and, in the latter case, it would seem to be equally so on the ground of mistake, and the violation of the implied warranty.⁵ But owing to the peculiar nature of the contract of marriage, this infirmity, though sometimes treated as a pure fraud,⁶ is, according to better opinions, regarded in a somewhat different aspect.⁷

This matrimonial impediment is termed impotence, or impotency. It may be difficult to give to it a perfectly accurate and unexceptional definition; in Mr. Shelford's work, it is said to "consist in the incapacity for copulation, or in the impossibility of accomplishing the act of procreation."⁸ Frazer, in his work on Domestic Relations, defines it as the "incapacity of either spouse for the act of copulation, or as some think, the want of power to procreate children."⁹ Webster has it, "inability to beget." While Bishop defines it as "such an incurable incapacity that the party can neither copulate nor procreate."¹⁰

¹ Guy's Forensic Med. Amer. Ed. 51.

² Bishop on Mar. & Div. § 226.

³ Chitty's Med. Juris. 378; Poynter on Mar. & Div. 123.

⁴ *Briggs v. Morgan*, 3 Phill. 325; 1 Eng. Eccl. R. 408, 410.

⁵ Bishop on Mar. & Div. §§ 99, 100, 117, 227; Rutherford's Inst., 1 Ch. 15, § 9; Rogers' Eccl. Law, 640.

⁶ *Benton v. Benton*, 1 Day, 111; *Guilford v. Guilford*, 9 Conn. 321, 327.

⁷ *Burtis v. Burtis*, 1 Hopk. Ch. R. 557; *Perry v. Perry*, 2 Paige Ch. R. 501; Bishop on Mar. & Div. § 227.

⁸ Shelford on Mar. & Div. 203.

⁹ Frazer on Dom. Rel. 53.

¹⁰ Bishop on Mar. & Div. § 228.

Impotence, to be a ground for a divorce, must exist at the time of marriage;¹ and it must be incurable.² And the burden of proof is on the complainant to establish that it existed at the time of the marriage, and that it is incurable.³

The sentence of divorce on the ground of impotency declares the marriage void from the beginning.⁴

On a bill by the husband for the wife's impotency, it was held that the wife will be compelled to submit to a surgical examination; but if she has already submitted to an examination by competent surgeons, whose testimony can be readily obtained, she will be excused from further examination.⁵

A motion for an order to compel the defendant to submit to an examination is addressed to the discretion of the chancellor, and his ruling is held not to be appealable.⁶

Where there is reason to believe that the incapacity can be removed by a slight surgical operation, the court will not annul the marriage. But the court has no power to compel a wife to submit to such operation; and her refusal to do so furnishes no ground to annul the marriage.⁷

No. 194. Bill for divorce on the ground of impotency.

STATE OF MICHIGAN.

The Circuit Court for the County of ———. In Chancery.
To the Circuit Court for the County of ———. In Chancery.

1. Your orator, A B, of, etc., respectfully represents unto this honorable court, that on, etc., your orator intermarried with one C D, now C B, at, etc., and that your orator is now, and has been a resident of this State for over one whole year next before the filing of this bill.

2. Your orator further represents, that immediately after the said marriage took place, your orator discovered that the said C B, at the time of her intermarriage with your orator as aforesaid, was, and has continued to be naturally impotent, and physically incapable of entering into the marriage state; that, etc. (*Here state the particular character of the impotency*;) so that the said marriage could not be consummated by the sexual intercourse of the parties.

¹ Bishop on Mar. & Div. § 235; *Bascomb v. Bascomb*, 5 Foster, 267.

² *Ferris v. Ferris*, 8 Conn. 166; 2 Atkin. 188; *J. G. v. H. G.*, 33 Md. 401.

³ *Newell v. Newell*, 9 Paige Ch. R. 25; *Devanbagh v. Devanbagh*, 5 Paige Ch. R. 554; *Welde v. Welde*, 2 Lee, 580; Bishop on Mar. & Div. § 235.

⁴ Bishop on Mar. & Div. §§ 46, 53, 59, 226, 227, 235, 261.

⁵ *Devanbagh v. Devanbagh*, 5 Paige Ch. R. 554; see *Newell v. Newell*, 9 Paige Ch. R. 25.

⁶ *Anon.*, 35 Ala. 326; see *LeBarron v. LeBarron*, 35 Vt. 365.

⁷ *Devanbagh v. Devanbagh*, 6 Paige Ch. 175.

3. And your orator further represents, that as he is informed and believes, and so charges the fact to be, that the said impotency and physical incapacity of the said C B still exists and is incurable.

4. And your orator positively avers that the acts done, and cause of divorce charged in this bill of complaint, for which divorce is sought, were committed without the consent, connivance, privity or procurement of your orator; and that such bill is not founded on, or exhibited in consequence of any collusion, agreement or understanding whatever between the parties thereto, or between your orator and any other person.¹

In consideration whereof your orator prays :

I. That the said C B, the defendant, may be required to, without oath (her answer on oath being hereby expressly waived), and according to the best and utmost of her several and respective knowledge, remembrance, information and belief, full, true, direct and perfect answer make, to ail and singular the matters hereinbefore stated and charged, as fully and particularly, sentence by sentence, and paragraph by paragraph, as if the same were here again repeated, and she thereto particularly interrogated.

II. That the marriage between your orator and the said C B may be dissolved, and a divorce from the bonds of matrimony decreed, according to the statute in such case made and provided.

III. That your orator may have such other relief, and such further relief in the premises, as shall be agreeable to equity and good conscience.

May it please the court, the premises being considered, to grant unto your orator the most gracious writ of subpoena of the people of the State of Michigan, to be issued out of and under the seal of this honorable court, to be directed to the said C B, therein and thereby commanding her on a certain day, and under a certain penalty to be therein inserted, personally to be and appear before this honorable court, then and there to answer all and singular the said premises, and to stand to, and abide and perform such order and decree therein, as shall be agreeable to equity and good conscience. And your orator will ever pray, etc.

A B.

J L H,

Solicitor for complainant, and of counsel.

No. 195. Affidavit to bill and of non-collusion.²

STATE OF MICHIGAN, }
County of———. } ss.

A B, the above named complainant, being first duly sworn, on his oath deposes and says, that he has heard read the foregoing bill of complaint by him subscribed, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be upon his information and belief, and as to those matters he believes it to be true.

Affiant further states that there is no collusion, understanding or agreement whatever between this affiant and C B, the defendant to said bill of

¹ Chan. Rule 29a.

² How. St. Sup. § 6232.

complaint or between this affiant and any other person, in relation to his said application for divorce.

A B.

Subscribed and sworn to before me by the said A B, this — day of —, 18—.

C D, Notary Public.

SECTION VII.

ADULTERY.

The statute, as we have already seen, provides that a divorce may be granted where either party has committed adultery subsequently to the marriage. A similar provision is in the statute of almost every State of the Union.

A suit for a divorce on the ground of adultery, will be barred by proof of a like offense by the complaining party, though committed even during the pendency of the suit.¹

Adultery, to be the foundation for a divorce, must be voluntary. If a wife be compelled by force or ravishment, or has carnal knowledge of a man not her husband through error or mistake, she believing him to be her husband,² or while she is insane,³ or by her husband's procurement,⁴ or marry another man through a belief that her former husband is dead, and during the continuance of such belief lives in matrimonial intercourse with him,⁵ a divorce will not be granted.

Circumstantial evidence.—Adultery being peculiarly a crime of darkness and secrecy, may be, and ordinarily must be, established by circumstantial evidence.⁶

To prove adultery by circumstantial evidence, two points

¹ *Davis v. Davis*, 19 Ill. 334; *Christianberry v. Christianberry*, 3 Blackf. 203; *Mattox v. Mattox*, 2 Ham. 233; *Lesseuer v. Lesseuer*, 31 Barb. N. Y. 330; *Clapp v. Clapp*, 97 Mass. 531; *Ribet v. Ribet*, 39 Ala. 343.

² Ayl. Parer. 226; Frazer on Dom. Rel. 81, 657; Bishop on Mar. & Div. §§ 204, 418.

³ *Broadstreet v. Broadstreet*, 7 Mass. 474; *Matchin v. Matchin*, 6 Barr. 333; *Nichols v. Nichols*, 31 Vt.

328; see *Wray v. Wray*, 19 Ala. 522; *Wray v. Wray*, 33 Ala. 187.

⁴ *Pierce v. Pierce*, 3 Pick. 299; *Myers v. Myers*, 41 Barb. N. Y. 114; *Henden v. Henden*, 6 C. E. Greene, 61.

⁵ *Valeau v. Valeau*, 6 Paige Ch. 207; Bishop on Mar. & Div. § 418.

⁶ *Richardson v. Richardson*, 4 Porter, 467; *Matchin v. Matchin*, 6 Barr. 332; *Dailey v. Dailey*, Wright Ch. Ohio, 514; *Day v. Day*, 3 Green's Ch. 444; *Ferguson v. Ferguson*, 3

are to be ascertained and established—the opportunity for the crime, and the will to commit it. Where both of these are established, the court will infer guilt.¹

The *particeps criminis* is a competent witness for the complainant;² but a court will seldom grant a divorce on such testimony unless corroborated.³

It is not sufficient to convict parties who may be supposed willing to commit adultery, to prove that they were in a position where it was possible to commit it. It must be shown that they were together under suspicious circumstances, which can not be easily accounted for unless they had that design, or which could not be well explained without it.⁴

Proof of adultery, however direct, is to be scanned very closely when the circumstances are improbable, and rejected if intrinsically incredible.⁵ But it may be supposed that licentious persons of opposite sexes, consorting together, and holding loose views of the marriage relation, commit such offenses as they have opportunity to commit.⁶ Yet, even under such circumstances, adultery must be proven by evidence and not by scandal.⁷ Evidence of reputation is not admissible as substantive proof to prove adultery, but it may be considered only subsidiary and subordinate evidence, as matter in aid of and incidental to the substantive proof, and going to explain and account for the conduct of the parties toward each other.⁸

The charge of adultery that is relied upon by the complainant, must not be stale. Where, in an action for divorce on the ground of adultery, two charges were preferred, one occurring more than twelve years prior to the suit, and it was sur-

Sandf. Ch. 307; *Van Epps v. Van Epps*, 6 Barb. N. Y. 320; *Mehle v. Lapeyrolerie*, 16 La. An. 4; *Bast v. Bast*, 82 Ill. 584; *Marble v. Marble*, 36 Mich. 386.

¹ *Moore v. Moore*, 1 Green N. J. 122, 276; see *Angelo v. Angelo*, 81 Ill. 251.

² *Moulton v. Moulton*, 1 Shep. Maine, 110; *Herrick v. Herrick*, 31 Mich. 298.

³ *Banta v. Banta*, 3 Edw. Ch. 295; see *Jenkins v. Jenkins*, 86 Ill. 340.

⁴ *Mayer v. Mayer*, 6 C. E. Greene, N. J. 246; *Thomas v. Thomas*, 51 Ill. 162; *Larrison v. Larrison*, 5 C. E. Greene, N. J. 100; *Hedden v. Hedden*, 6 C. E. Greene, N. J. 61; *Thayer v. Thayer*, 101 Mass. 111.

⁵ *Bishop v. Bishop*, 17 Mich. 211.

⁶ *McClung v. McClung*, 40 Mich. 494.

⁷ *Soper v. Soper*, 29 Mich. 306.

⁸ *Marble v. Marble*, 36 Mich. 386.

rounded by circumstances well calculated to induce inquiry that would have disclosed the real facts, it was regarded as a stale charge.¹

So, too, the evidence in support of the charges of the bill, must be relevant; the proof must correspond to the allegations. Therefore, where a bill for divorce charged adultery to have been committed at two different places therein named, testimony which tended to prove the commission of adultery at a third place not named in the bill, was held to be wholly irrelevant and unwarranted.²

The Supreme Court of Michigan has very properly discouraged the practice of calling young children, even of twelve years of age, as witnesses to prove adultery against their parents. Very little weight will be given to their testimony, and to drag them into such cases can not be otherwise than an injury to their morals.³

Frame of bill charging adultery.—A divorce can not be decreed upon a bill charging adultery generally, without stating either time, place or circumstances, though the persons with whom it is committed are unknown.⁴ And it is held, that if the bill alleges adultery with a particular person, it will not be sustained by proof of adultery with any other person.⁵

The name of the person with whom the adultery was committed should be given.⁶ A charge of adultery with a certain woman, is too indefinite,⁷ if known; and if not known, it must be alleged that it is unknown. The time and place of committing the act should also be stated with reasonable certainty, so that the adverse party may be prepared to meet the charge.⁸

A charge of extreme cruelty and a charge of adultery may be joined in the same bill, and the court will decree a divorce according to the evidence produced.⁹

¹ *Stuart v. Stuart*, 47 Mich. 566.

² *Green v. Green*, 26 Mich. 437; *Bennett v. Bennett*, 40 Mich. 482.

³ *Kneale v. Kneale*, 28 Mich. 344; *Crowner v. Crowner*, 44 Mich. 180.

⁴ *Kane v. Kane*, 3 Edw. Ch. 389.

⁵ *Washburn v. Washburn*, 5 N. H. 195.

⁶ *Bird v. Bird*, Wright Ch. 98; *Richards v. Richards*, 1b. 302; *Morrell v. Morrell*, 1 Barb. 318.

⁷ *Mansfield v. Mansfield*, Wright Ch. 284.

⁸ *Shoemaker v. Shoemaker*, 20 Mich. 222; *Randall v. Randall*, 31 Mich. 194; *Herrick v. Herrick*, 31 Mich. 298; *Green v. Green*, 26 Mich. 437; *Dunn v. Dunn*, 11 Mich. 284; *Morrell v. Morrell*, 1 Barb. N. Y. 318.

⁹ *Young v. Young*, 4 Mass. 430.

No. 195a. Bill by husband for a divorce, charging adultery.

STATE OF MICHIGAN, }
 County of ———. } ss.

To the Circuit Court for the County of ———. In Chancery.

1. Your orator, A B, of, etc., respectfully represents unto this honorable court, that on, etc., your orator was lawfully joined in marriage with C B, the defendant hereinafter named; and that your orator is now a resident of said county, and is now, and has been a resident of this State for more than ——— years last past; that your orator lived and cohabited with the said C B as her husband from the time of their intermarriage until, etc., and in all respects demeaned himself as a kind and indulgent husband; that on, etc., becoming acquainted with the facts hereinafter set forth, he left the said C B, and has refused to live and cohabit with her since that time.

2. That as the issue of said marriage the said C B has borne to your orator ——— children viz.: (*Here set forth the names and ages of the children. If there are no children state the fact.*)

3. Your orator further represents, that on, etc., at, etc., and at various other times and places since the said marriage, the said C B, in utter disregard and in violation of her marriage duty and obligations, committed adultery and had carnal knowledge with one E F; and that the said C B has at divers other times and places, to your orator unknown, since the said marriage, committed adultery with divers other persons to your orator unknown. (*Here set forth any other act according to circumstances.*)

4. And your orator positively avers that the several acts of adultery hereinbefore charged were all committed without the consent, connivance, privity or procurement of your orator, and that he has not voluntarily cohabited with this defendant since the discovery of such adultery, on the ——— day of ———, A. D. 18—, and that all of said acts were committed without the consent, connivance, privity or procurement of your orator, and that this bill is not founded on, or exhibited in consequence of any collusion, agreement or understanding whatever, between the parties hereto, or between your orator, and any other person; and that he has never been guilty of any act of adultery or misconduct, as hereinbefore charged against this defendant.

In consideration whereof, your orator prays:

I. That the said C B, the defendant hereinbefore named, may be required without oath (her answer on oath being hereby expressly waived), to full, true, direct and perfect answers make, to all and singular the matters hereinbefore stated and charged.

II. That the marriage between your orator and the said C B, this defendant, may be dissolved, and a divorce from the bonds of matrimony decreed, according to the statute in such case made and provided;

III. That your orator may have such other and further relief, in the premises, as shall be agreeable to equity and good conscience.

May it please the court, the premises being considered, to grant unto your orator the people's writ of subpœna, to be issued out of and under the seal of this honorable court, to be directed to the said C B, the defendant, therein and thereby commanding her, on a certain day, and under a certain penalty to be therein inserted, personally to be and appear before this

honorable court, then and there to answer all and singular the matters and things hereinbefore set forth, and to stand to, abide by and perform such *order and decree* herein, as shall be agreeable to equity and good conscience. And your orator will ever pray, etc. A B.

C A J,

Solicitor, and of counsel for complainant.

STATE OF MICHIGAN, }
County of ——— } ss.

A B, the above-named complainant, being duly sworn, says that he has read the foregoing bill of complaint, by him subscribed, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be on information and belief, and as to those matters he believes it to be true. Affiant further states that there is no collusion, understanding or agreement whatever between this affiant and C B, the defendant to said bill of complaint, or between your orator and any other person, in relation to his said application for a divorce.

Subscribed, etc.

A B.

No. 196. Bill for divorce by wife charging adultery, and praying for alimony and the custody of children.

To the Circuit Court for the County of ———. In Chancery.

STATE OF MICHIGAN, }
County of ———. } ss.

1. Your oratrix, A B, shows unto the court that she is now, and has been for more than a year now last past, a resident of said county and State.

2. Your oratrix further shows, that on or about the — day of —, A. D. 18—, at — county, your oratrix was duly and legally married to the defendant herein, C B, by —, and that the name of your oratrix previous to the said marriage was C D.

3. And your oratrix further shows, that she has been informed, and verily believes, and therefore charges the truth to be, that said defendant, disregarding the solemnity of the marriage vow, hath, since said marriage, committed adultery and had illicit carnal intercourse with divers persons, whose names are at present unknown to your oratrix, at divers times and places, but at what times and places your oratrix is not informed. And further, that on or about the — day of —, A. D. 18—, at —, this defendant did commit adultery and have illicit carnal intercourse with one G H, and has at divers other places and times, since said marriage, to your oratrix unknown, committed adultery with the said G H, and with divers other lewd women, whose names are also to your oratrix unknown. (*Here set forth any other act of adultery, giving names, time, place, and circumstances as near as possible.*)

4. Your oratrix further represents that she has ever since said marriage demeaned herself to the said C B as a faithful, chaste and affectionate wife; and as the issue of such marriage your oratrix has borne to the said C B two children, viz., F B and G B, now aged three and five years respectively,

who are both living, and have remained under the care and control of your oratrix.

5. Your oratrix further represents, that the said C B is a man of low, vicious and vulgar habits, and is addicted to the use of obscene and profane language towards your oratrix and their said children, in the presence and hearing of the said children; and is a person wholly unfit to be intrusted with the care, custody and education of children.

6. Your oratrix further represents, that the said C B is the owner in fee simple of the following described real property, to wit: (*Here describe the real estate,*) of great value, to wit: of the value of ——— dollars; and is the owner of a large amount of personal property, consisting of, etc. (*Here describe it, and set forth his pecuniary circumstances and calling fully.*) That your oratrix is poor, without means to support herself and children and to prosecute this suit; and that the said C B is abundantly able to supply all the necessities and wants of your oratrix and the said children, but wholly neglects and refuses so to do; and your oratrix is now compelled to accept assistance from her relatives and friends to live and subsist from day to day; and that the said children and your oratrix are but poorly supplied with clothing and other comforts of life suitable to her and their condition in life.

7. Your oratrix further represents, that the said C B threatens, and your oratrix fears that he will carry his threat into execution, to sell off all his real and personal property, to prevent your oratrix from obtaining alimony therefrom for the support of herself and her said children; and that the said C B ought to be restrained by the injunction of this honorable court from selling, assigning, incumbering or otherwise disposing of the said property until the hearing of this cause, and suitable provision is made for the support of your oratrix and the said children.

In consideration thereof, and forasmuch as your oratrix is without remedy in the premises, except in a court of equity, your oratrix prays:

I. That the said C B, who is made party defendant to this bill, may be required to make full and direct answer to the same;

II. That your oratrix may be divorced and forever freed from the bonds of matrimony now existing between her and the said C B;

III. That the care, custody and education of the said children may be awarded to your oratrix;

IV. That this court will decree to your oratrix such portions of the property of the said C B, or such sums of money to be paid by the said C B to her, as this court may deem necessary and proper for the maintenance of your oratrix and the said children;

V. That the said C B may be required to pay to your oratrix a sufficient sum of money to enable her to employ counsel and to prosecute this suit, and for the support of herself and the said children during the pendency thereof;

VI. That the said C B may be restrained by the injunction of this court from selling, assigning, incumbering, or otherwise disposing of the said property until the further order of this honorable court;

VII. That your oratrix may have such other and further relief in the premises as equity may require, and to this honorable court shall seem meet.

May it please the court to grant unto your oratrix the people's writ of injunction, to be directed to the said C B, restraining him, etc., from, etc., (*here set forth the matter sought to be enjoined, as in the above prayer,*) until the further order of this court.

May it also please the court, the premises being considered, to grant unto your oratrix the people's writ of subpoena, to be issued out of and under the seal of this honorable court, to be directed to the said C B, the defendant therein and thereby commanding him, on a certain day, and under a certain penalty to be therein inserted, personally to be and appear before this honorable court, then and there to answer all and singular the matters and things hereinbefore set forth, and to stand to, abide by and perform such order and decree herein, as shall be agreeable to equity and good conscience. And your oratrix will ever pray, etc.

A B,

H C B,

Solicitor for complainant.

.. (*Add affidavit as in last preceding precedent.*)

SECTION VIII.

CONVICTION OF CRIME.

A divorce may be granted when one of the parties has been sentenced to imprisonment in any prison, jail or house of correction for three years or more.¹ It has been held that conviction and imprisonment in another jurisdiction is not cause for divorce.²

No. 197. Bill for a divorce, charging a conviction of a felony and sentence to the State prison for three years.

STATE OF MICHIGAN. }
County of ———. } ss.

To the Circuit Court for the County of ———. In Chancery.

1. Your oratrix, A B, shows unto the court that she is now, and has been for more than a year now last past, a resident of said county and State.

2. Your oratrix further shows, that on or about the — day of —, A. D. 18—, at —, county of —, your oratrix was duly and legally married to the defendant herein, C B, by —, and that the name of your oratrix previous to the said marriage was —.

3. That as the issue of such marriage your oratrix has borne to the said C B — children, viz. (*Here set forth the names and ages of the children. If there be no children state the fact.*)

¹ Comp. L. 1871, § 4738; How. St. § 6228; see *Johnson v. Johnson*, Walk. Ch. 309.

² *Martin v. Martin*, 47 N. H. 52; see *Sherman v. Sherman*, 18 Texas, 521.

4. Your oratrix further represents, that on, etc., at, etc., at a term of the — court of the county of —, in said State, begun and held in said county, on, etc., before the honorable —, judge thereof, presiding, the said C B was duly convicted of the crime of *larceny*, and was then and there, by the judgment of that court, sentenced to confinement in the penitentiary of said State, for the term of three years, at hard labor, which said judgment still remains in full force and effect, not reversed, annulled or vacated, as by the records and proceedings in said court now remaining, reference thereto being had, will more fully appear.

5. And your oratrix positively avers that the acts done, and herein charged, for which divorce is sought, were all committed without the consent, connivance, privity or procurement of your oratrix, and that this bill is not founded on or exhibited in consequence of any collusion, agreement or understanding whatever, between the parties hereto, or between your oratrix and any other person.

In consideration whereof, your oratrix prays:

I. That the said C B, the defendant hereinbefore named, may be required to, without oath (his answer on oath being hereby expressly waived), full, true, direct and perfect answer make, to all and singular the matters hereinbefore stated and charged.

II. That the marriage between your oratrix and the said C B, this defendant, may be dissolved, and a divorce from the bonds of matrimony decreed, according to the statute in such case made and provided;

III. That your oratrix may have such other and further relief in the premises, as shall be agreeable to equity and good conscience.

May it please the court, the premises being considered, to grant unto your oratrix the people's writ of subpoena, to be issued out of and under the seal of this honorable court, to be directed to the said C B, the defendant, therein and thereby commanding him, on a certain day, and under a certain penalty, to be therein inserted, personally to be and appear before this honorable court, then and there to answer all and singular the matters and things hereinbefore set forth, and to stand to, abide by and perform, such order and decree herein, as shall be agreeable to equity and good conscience. And your oratrix will ever pray, etc.

A B.

F K,

Solicitor, and of counsel for complainant.

(Add verification as in form No. 195.)

SECTION IX.

DESERTION FOR TWO YEARS.

If either party deserts the other for the term of two years, it is cause for divorce.¹

A separation with the consent or acquiescence of the parties, does not constitute desertion.² The desertion must be

¹Comp. L. § 4738; How. St. § 6228. ²*Cox v. Cox*, 35 Mich. 461.

willful, and it must continue for the space of two years.¹ To constitute the offense of desertion, as contemplated by the statute, it must be and continue to be, for the period named, a voluntary breaking of matrimonial cohabitation by one party against the will of the other, and under circumstances which the law does not consider sufficient to justify it.² Mutual treaties and deliberations within the period named by the statute, with a view of living together again, are inconsistent with the kind of desertion required by the law.³

If a husband and wife separate by voluntary arrangements, the living apart, in pursuance of it, can not be called desertion.⁴

A divorce can not be granted on the charge of desertion, except on satisfactory proof of three things: *First*, cessation of cohabitation; *second*, an intent in the mind of the defendant to desert; and, *third*, that the separation was against the will of the complainant.⁵

Where a husband and wife left his farm and went to reside with the wife's parents, and three months afterward they separated; but the proof failed to show whether he was driven away or left voluntarily, intending to desert his wife, it has been held that such facts would not entitle the wife to a decree of divorce on the ground of desertion.⁶

Desertion, under the statute, is the willful abandonment of one party by the other without cause, and against the will of the party abandoned, for the period of two years. If the husband's conduct is so cruel toward his wife that she can not live and cohabit with him with safety to her health, or without peril to her life, or if she has good reason to believe she can not, and for such reason she leaves him and abandons his home, she does not thereby commit the offense of desertion.⁷

¹ *Thomas v. Thomas*, 51 Ill. 162; see *Rearis v. Rearis*, 1 Scam. 242.

² *Porrirt v. Porrirt*, 18 Mich. 420; *Wright v. Wright*, 80 Mich. 572; *Dashback v. Dashback*, 62 Mich. 322.

³ *Rudd v. Rudd*, 33 Mich. 102; *Cooper v. Cooper*, 17 Mich. 205; *Holmes v. Holmes*, 44 Mich. 555.

⁴ *Stoffer v. Stoffer*, 50 Mich. 491; see *Johnson v. Johnson*, 125 Ill. 510.

⁵ *Rose v. Rose*, 50 Mich. 92; *Cooper*

v. Cooper, 17 Mich. 205; *Porrirt v. Porrirt*, 18 Mich. 420; *Rudd v. Rudd*, 33 Mich. 101; *Cox v. Cox*, 35 Mich. 461; *Sergent v. Sergent*, 33 N. J. Eq. 204; *Beller v. Beller*, 50 Mich. 49.

⁶ *Dashback v. Dashback*, 62 Mich. 322.

⁷ *Warner v. Warner*, 54 Mich. 494; *Reed v. Reed*, *Wright*, 224; *Fellows v. Fellows*, 31 Maine 342; *Ahrenfeldt v. Ahrenfeldt*, 1 Hoff. Ch. 47.

Where a bill for divorce against a wife is grounded on adultery, it will not sustain a decree for desertion, if the only allegations on that point are that the defendant has lived away from her husband for a period of less than two years in adulterous cohabitation with a specified person; and that the complainant has not voluntarily cohabited with the defendant since the discovery of such adultery.¹

If a bill is prematurely filed, the defect can not be cured by filing a supplemental bill after the two years have elapsed. A hearing can only be had on the grounds which existed when the suit was commenced, and subsequent grounds can not be incorporated into the case after the commencement of the proceedings.² Two periods of desertion can not be added together to make up the time specified in the statute.³

Separation and intention to abandon must concur in order to constitute the ground for divorce. But they need not be identical in their commencement. If one should leave the other on business, and afterward determine not to return, the desertion would commence from the time the intention was formed.⁴

No. 198. Bill for divorce for desertion.

STATE OF MICHIGAN, }
County of ———. } ss.

To the Circuit Court for the County of ———. In Chancery.

1. Your orator, A B, of the township of ———, county and State aforesaid, respectfully represents unto this honorable court, that he is an actual resident of the said county of ———, and is now and has been for ——— years last past, a resident of the township of ———, in the State of Michigan; that on, etc., at, etc., he was lawfully married to one C D, now C B, the defendant hereinafter named, and from the time of the said marriage until, etc., he lived and cohabited with the said C B as her husband; and always conducted himself toward his said wife as a true, kind and indulgent husband, and provided her with all the necessaries and comforts of life, according to the best of his means and their situation in life.

2. That as the issue of said marriage the said C B has born of your orator, ——— children, viz: (*Here set forth the name and ages of the children. If there be none state the fact.*)

3. Your orator further represents, that the said C B, wholly regardless of her marriage covenants and duty, afterwards, on, etc., willfully deserted

¹ *Powell v. Powell*, 58 Mich. 299;
Rathbun v. Rathbun, 76 Mich. 462.

² *Embree v. Embree*, 53 Ill. 394.

³ *Gaillard v. Gaillard*, 23 Miss. 152.

⁴ *Pinkard v. Pinkard*, 14 Texas, 356; *Reed v. Reed*, Wright Ch. 224;
Phelan v. Phelan, 12 Florida, 449;
Kennedy v. Kennedy, 87 Ill. 250.

and absented herself from your orator, without any reasonable cause, for the space of two years and upwards, and has persisted in such desertion, and yet continues to absent herself from your orator.

4. And your orator positively avers that the acts done by the said defendant, and hereinbefore charged, and for which divorce is sought, were all committed without the consent, connivance, privity or procurement of your orator, and that this bill of complaint is not founded on or exhibited in consequence of any collusion, agreement or understanding whatever, between the parties hereto, or between your orator and any other person.

Forasmuch, therefore, as your orator is without remedy in the premises, except in a court of equity, your orator prays:

I. That the said C B, who is made a party defendant to this bill, may be required to (without oath, her answer on oath being hereby expressly waived, full, true, direct and perfect answer make, to all and singular the matters hereinbefore stated and charged.

II. That the marriage between your orator and the said C B, the defendant, may be dissolved, and a divorce from the bonds of matrimony decreed according to the statute in such case made and provided;

III. That your orator may have such other and further relief, in the premises, as shall be agreeable to equity and good conscience.

May it please the court, the premises being considered, to grant unto your orator the people's writ of subpoena, to be issued out of and under the seal of this honorable court, to be directed to the said C B, this defendant, therein and thereby commanding her, on a certain day, and under a certain penalty to be therein inserted, personally to be and appear before this honorable court, then and there to answer all and singular the matters and things hereinbefore set forth, and to stand to, abide by and perform, such order and decree herein, as shall be agreeable to equity and good conscience. And your orator will ever pray, etc.

A B.

W S,
Solicitor for complainant, and of counsel.
(Add verification as in form 195.)

SECTION X.

HABITUAL DRUNKENNESS.

A divorce may be granted when either party shall have become an habitual drunkard.¹

Our courts have construed this language to mean that the habit must have been contracted subsequent to the marriage, unless, perhaps, when such habit was concealed from the com-

¹ Comp. L. 1871, § 4738; How. St. 438; *Berryman v. Berryman*, 59 § 6228; See *Kline v. Kline*, 50 Mich. Mich. 605.

plainant's knowledge until after the marriage.' If the complainant was aware before marriage that the defendant was an habitual drunkard, a divorce will not be granted.

What amounts to habitual drunkenness is generally a question of law; and, therefore, on the hearing of the cause, it is not sufficient that the witness testify in general terms that the defendant is an habitual drunkard, but the witness should give the particular facts and circumstances, so that the court may judge of their sufficiency.² In Michigan it has been held that one who has the habit of indulging in intoxicating liquors so firmly fixed that he becomes intoxicated as often as the temptation is presented by his being in the vicinity where liquors are sold, is an habitual drunkard within the meaning of the law.³ In California the court has said that a fixed habit of drinking to excess, to such a degree as to disqualify a person from attending to his business, during the principal portion of the time usually devoted to business, is such habitual intemperance as is made a ground for divorce.⁴ Occasional intoxication is not habitual drunkenness in a woman any more than in a man.⁵

No. 199. Bill for divorce, charging habitual drunkenness, and praying for custody of children, alimony, injunction, etc.

STATE OF MICHIGAN.

The Circuit Court for the County of ——. In Chancery.
To the Circuit Court for the County of ——. In Chancery.

1. Your oratrix, A B, of, etc., respectfully represents unto this honorable court, that she is an actual resident of the said county of —, and is now, and has been a resident of the State of Michigan for over one year last past; that on, etc., at, etc., she was lawfully married to one C B, and from that time until, etc., lived and cohabited with him as his wife, and during all that time faithfully performed all her duties and obligations as a wife, bearing with her husband's faults and errors, and striving to make their home and family comfortable and happy.

2. Your oratrix further represents, that the said C B, wholly regardless of his obligations as a husband, a few years after the said marriage, commenced the excessive use of intoxicating liquors, and has become and is an habitual drunkard, and is and has been guilty of habitual drunkenness; that he has constantly been on sprees. That among the many different

¹ *Porritt v. Porritt*, 16 Mich. 140.

³ *Magahay v. Magahay*, 35 Mich.

² Bishop on Mar. & Div. § 532; 210.

Batchelder v. Batchelder, 14 N. H. 380.

⁴ *Mahone v. Mahone*, 19 Cal. 627.

⁵ *Meath v. Meath*, 83 Mich. 150.

occasions that the said defendant has been intoxicated may be enumerated the following: (*Here set forth the different occasions of drunkenness by the defendant somewhat fully and as far as practicable, with facts going to show defendant to be an habitual drunkard.*)

3. Your oratrix shows that defendant remains in an intoxicated condition almost continually, and is unfit to attend to his usual occupation and business; that while he is thus intoxicated, he is very quarrelsome, and ill-treats his family, using abusive language and opprobrious epithets, rendering your oratrix's condition intolerable, and her life burdensome; in consequence of which she was compelled to withdraw with her children from their home.

4. Your oratrix further represents, that as the issue of such marriage she has had by the said C B three children, viz., E B, now aged — years; F B, now aged — years; and G B, now aged — years; and that in consequence of his drunken habits and abusive language, the said C B is a person wholly unfit to have the care, custody and education of said children.

5. Your oratrix further represents, that the said C B is the owner in fee of the following described real property, to wit (*here describe the real estate*), of great value, to wit, of the value of about — dollars; and is the owner of the following described personal property and effects, to wit (*here describe*): that your oratrix is without means of subsistence, except as she is able to earn the same by her own labor; that the said C B is able to support your oratrix and their said children if he was disposed to do so.

6. Your oratrix further represents, that the said C B has given out his intention, and threatens to sell and dispose of all his property as aforesaid, and to leave your oratrix and the said children without any means of support; and your oratrix has good reasons to fear, and does fear, that he will carry his said threats and intentions into execution unless he is restrained by the injunction of this honorable court.

7. And your oratrix positively avers that the acts charged in this her bill of complaint and for which divorce is sought, were all committed without the consent, connivance, privity or procurement of your oratrix, and that this bill is not founded on or exhibited in consequence of any collusion, agreement or understanding whatever between the parties hereto, or between your oratrix and any other person.

Forasmuch, therefore, as your oratrix is without remedy in the premises, except in a court of equity, your oratrix prays:

I. That the said C B, who is made party defendant to this bill, may be required to make full and direct answer to the same (but without oath, his answer on oath being hereby expressly waived);

II. That your oratrix may be divorced and forever freed from the bonds of matrimony now existing between her and the said C B;

III. That the care, custody and education of the said children may be awarded to your oratrix;

IV. That your honor will decree to your oratrix such portions of the property of the said C B, or such sums of money to be paid by the said C B to her, as your honor may deem necessary and proper for the maintenance of your oratrix and the said children;

V. That the said C B may be required to pay to your oratrix a sufficient

sum of money to enable her to employ counsel, and to prosecute this suit, and for her support, and that of said children, during the pendency thereof;

VI. That the said C B may be restrained by the order and injunction of this honorable court, from selling, assigning, incumbering or otherwise disposing of the said property, until the further order of this court;

VII. That your oratrix may have such other and further relief in the premises as equity may require and to your honor shall seem meet.

May it please, etc. (*Add prayer for injunction and for process, and add verification as in No. 195, ante.*)

SECTION XI.

EXTREME CRUELTY.

If a husband or wife has been guilty of extreme cruelty toward the other, a divorce may be obtained under the statute for that cause.¹

The statutes of many States are more strict than Michigan with regard to cruelty as a cause for divorce, and accordingly it has been held in many courts of last resort that cruelty must consist in physical violence, and not in angry or abusive epithets, or even profane language, and it must be shown to have been repeated.² Austerity of temper, sallies of passion, or abusive language, do not constitute such extreme and repeated cruelty, within the statute, as to authorize a decree of divorce.³

But our statute provides that a divorce may be granted for extreme cruelty, "whether practiced by using personal violence or by any other means." It was evidently the intention of our legislature, that divorces from the bond of marriage should seldom be granted upon the ground of extreme cruelty. For, while saying that a divorce from bed and board may be granted upon that ground, the statute also provides that the court may grant a decree from the bond of marriage for

¹ How. St. § 6228.

² *Fizette v. Fizette*, 146 Ill. 328; *Vignos v. Vignos*, 15 Ill. 186; *Shaw v. Shaw*, 17 Conn. 189; *Peabody v. Peabody*, 104 Mass. 195; *Moyler v. Moyler*, 11 Ala. 620; *Hughes v. Hughes*, 19 Ala. 307; *Bailey v. Bailey*,

97 Mass. 373; *Odom v. Odom*, 36 Geo. 286.

³ *Turbitt v. Turbitt*, 21 Ill. 438; *Shell v. Shell*, 2 Sneed, Tenn. 716; *Ford v. Ford*, 104 Mass. 198; *Hughes v. Hughes*, 44 Ala. 698; *Conesey v. Conesey*, 60 Ill. 188; *Fritz v. Fritz*, 138 Ill. 436.

extreme cruelty, whenever, in its opinion, "from the circumstances of the case, it will be discreet and proper so to do." The whole matter is left to the discretion of the court, with the plain intimation that the court should carefully scrutinize each case, and wisely use the discretion given.

Our Supreme Court has held that while our statutes do not confine the definition of cruelty to physical violence, still the grievances, whether mental or physical, must be of the most aggravated nature, in order to justify a divorce.¹ Courts can not lawfully divorce parties merely because from unruly tempers and mutual wrangling, they can not live happily together. They are bound to submit to the ordinary consequences of human infirmity and unwise selection, and the misconduct which will authorize a divorce must be very serious, and such as amounts to *extreme* cruelty, entirely subverting the family relations by rendering the association intolerable.² Violence committed during a quarrel in which the husband suffers as much as the wife, is not such cruelty as will sustain a divorce against him.³

But profane, obscene and insulting language habitually indulged toward a wife of sensitive nature and refined feelings, especially in the presence of her children, may amount to extreme cruelty. This, as a general rule, would be more readily recognized when used by the husband to the wife, than when by the wife to the husband.⁴ It is extreme cruelty for the husband to openly consort with, and to express his preference for loose females.⁵ Or to communicate to his wife a venereal disease; but the fact that a wife whose chastity is unsuspected, is found to have a venereal disease, is not sufficient evidence that the disease was communicated to her by her husband.⁶

¹ *Cooper v. Cooper*, 17 Mich. 205; *Lapp v. Lapp*, 43 Mich. 287; *Bishop v. Bishop*, 17 Mich. 212; *Bennett v. Bennett*, 24 Mich. 482; *Brown v. Brown*, 24 Mich. 242; *Palmer v. Palmer*, 45 Mich. 150; *Holmes v. Holmes*, 44 Mich. 555; *Cox v. Cox*, 35 Mich. 461; *Canfield v. Canfield*, 34 Mich. 519.

² *Cooper v. Cooper*, 17 Mich. 205;

³ *Soper v. Soper*, 29 Mich. 305.

⁴ *Bennett v. Bennett*, 24 Mich. 482. *Goodman v. Goodman*, 26 Mich. 417.

⁵ *McClung v. McClung*, 40 Mich. 493.

⁶ *Holthoeferv. Holthoeferv.*, 47 Mich. 260.

Where the husband is the complainant, it is not sufficient to show slight acts of violence on the part of the wife toward him.¹

Where extreme cruelty is alleged as a cause of divorce, there should be a specification of the acts of cruelty complained of.²

Although the specific acts of cruelty must be set out in the bill, yet the evidence is not necessarily limited to the particular facts charged. Thus, acts of personal violence, when intrinsically and separately considered, may not justify a divorce; yet when attended by habitual brutal behavior, so as to be a constant outrage upon the sense of decency and propriety of the party to be affected by them, a case of extreme cruelty within the meaning of the statute is established.³

But a decree for divorce can not be sustained on the ground of extreme cruelty, upon evidence as to an act of personal violence not set up in the bill, especially where it appears that such act, if it occurred at all, was committed some months after the bill was filed.⁴

Where a bill for divorce on the ground of extreme cruelty fails to specify acts of cruelty, it is insufficient to allow the introduction of any proof upon that branch of the case.⁵

Mutual wrangling over money matters does not make out a case of extreme cruelty between husband and wife.⁶

It seems that in a proceeding for divorce for such causes as drunkenness and cruelty between parties who are unrefined, and whose ways of life and habits of speech ought not to be tried by the standard of cultivated people, their case should be judged by the rules which respectable persons of the same condition in life would spontaneously acknowledge.⁷

It is extreme cruelty, justifying a divorce, for a wife to causelessly humiliate and disgrace her husband, and endanger his means of subsistence, by habitually, persistently and publicly accusing him of infamous conduct, in violation of his

¹ *Birkley v. Birkley*, 15 Ill. 120; *De La Hay v. De La Hay*, 21 Ill. 252; see *Lynch v. Lynch*, 33 Md. 328.

² *Fellows v. Fellows*, 8 N. H. 160; *Hill v. Hill*, 10 Ala. 527; *Wright v. Wright*, 3 Texas, 168; *Byrne v. Byrne*, Ib. 336.

³ *Briggs v. Briggs*, 20 Mich. 34; see

Berdell v. Berdell, 80 Ill. 604; *Farnham v. Farnham*, 73 Ill. 497.

⁴ *Bennett v. Bennett*, 24 Mich. 482.

⁵ *Dashback v. Dashback*, 62 Mich. 322; *Briggs v. Briggs*, 20 Mich. 41; *Bennett v. Bennett*, 24 Mich. 482.

⁶ *Beller v. Beller*, 50 Mich. 49.

⁷ *Kline v. Kline*, 50 Mich. 438.

marriage obligations, and by applying vile and vulgar epithets to him, and dogging him, and setting others to spy out his movements, until by inordinate and indecent exhibitions of jealousy, and the criminal indulgence of unworthy suspicions and ungoverned violence, she has practically destroyed the decencies and purposes of the marriage relation.¹

It is extreme cruelty for a husband to call a sensitive and refined wife vile and wicked names, and to curse and swear at her.²

There is nothing that inflicts so deep and cruel a wound upon a pure wife as a false accusation of want of chastity, beside which physical injuries are as nothing. It would be a reproach to our laws that it were not permissible for a wife to abandon her husband, who should cruelly, without just reason, reproach her with a want of virtue and fidelity to her marriage vows. Happily, the law will not require her to submit to any such degradation. Such conduct will justify the wife in abandoning her husband, where such cruel accusations will add no more to her weight of sorrow.³

It is extreme cruelty to turn a wife and her daughter out of doors without cause, and to make their separation the condition of taking the wife back again.⁴

It is always difficult to determine in every case with precision what is and what is not extreme cruelty. The same act is not the same thing under all circumstances and to all persons. Necessarily each case must be, to a large extent, judged by itself.⁵

The fact, even if true, that a wife is shown not to be of the most refined character, and that she has not always been truly ladylike in her behavior, but at times, when in anger, has been guilty of profanity, and has not remonstrated with her husband as she ought, or rebuked him for using liquor to excess, furnishes no adequate excuse for the abuse of his wife in his drunken moods, which are so frequent as to be habitual.⁶

¹ *Whitmore v. Whitmore*, 49 Mich. 417.

² *Warner v. Warner*, 54 Mich. 492.

³ See *Farnham v. Farnham*, 73 Ill. 497; *Ward v. Ward*, 103 Ill. 482; *Sharp v. Sharp*, 116 Ill. 509; *Kennedy v. Kennedy*, 73 N. Y. 369.

⁴ *Friend v. Friend*, 53 Mich. 543;

see *Briggs v. Briggs*, 20 Mich. 34; *Burr v. Burr*, 7 Hill, 207; *Page v. Page*, 51 Mich. 89.

⁵ *Ward v. Ward*, 103 Ill. 477; *Ratts v. Ratts*, 11 Ill. App. (Bradw.) R. 366; *Lazovert v. Lazovert*, 14 Ib. 653.

⁶ *Berryman v. Berryman*, 59 Mich. 603.

Where the testimony in a divorce case showed that during the one year the parties lived together, the husband, being of sufficient ability, furnished his wife a very stingy support, and during ten months of that time he was in the habit of using profane language toward her, calling her vile and indecent names in the presence of her children, and to one of whom he gave a flogging, and frequently threatened to drive them away from home, and finally told his wife that he would live with her no longer, and drove her from the house, it was held sufficient to entitle the wife to a divorce for failure to support and for cruel treatment, within the meaning of How. Stat. Sec. 6229.²

A husband who forces his wife to do more work than she is capable of performing in her state of health, which is delicate, and thus compels her to leave him, is guilty of such extreme cruelty as entitles her to a divorce.³

As to what constitutes cruelty within the meaning of the statute, see the cases noted below.⁴

No. 200. Bill for divorce on the ground of extreme cruelty.

STATE OF MICHIGAN, }
County of ———. } ss.

To the Circuit Court for the County of ———. In Chancery.

1. Your orator, A B, of, etc., respectfully represents unto this honorable court, that he is an actual resident of the county of — aforesaid, and is, and has been, a resident of the State of Michigan for — years last past; that on, etc., at, etc., he was lawfully married to one C D, now C B, with whom he resided until, etc., when he was compelled to leave and cease living with her, in consequence of the ill-treatment hereinafter mentioned; that during the time he so lived with the said C B, he always conducted himself toward her with kindness, and as a true and indulgent husband, supplying all her wants and necessities, according to the best of his means and ability, and suitable to his and her condition in life.

2. That as the issue of said marriage the said C B has born of your

¹ *Whitacer v. Whitacer*, 64 Mich. 233; see *Sharp v. Sharp*, 116 Ill. 509.

² *DeZwaan v. DeZwaan*, 91 Mich. 279.

³ *Taylor v. Taylor*, 73 Mich. 266; *Burlage v. Burlage*, 65 Mich. 624; *Thompson v. Thompson*, 79 Mich. 124; *Ortman v. Ortman*, 92 Mich.

173; *Runkle v. Runkle*, 96 Mich. 493; *Cary v. Cary*, 106 Mich. 646; *Menzer v. Menzer*, 83 Mich. 319; *Minde v. Minde*, 65 Mich. 633; *Peck v. Peck*, 66 Mich. 586; *Cooper v. Cooper*, 78 Mich. 316; *Sissing v. Sissing*, 65 Mich. 179; *Brick v. Brick*, 65 Mich. 230.

orator — children, viz. (*Here set forth the names and ages of the children. If there be none, state the fact.*)

3. Your orator further represents, that the said C D. not regarding her marriage relations and duties, has, since the said intermarriage, been guilty of extreme and repeated cruelty toward your orator, in this, that she is a woman of great austerity of temper, and very frequently, during the past — years, has indulged in violent sallies of passion, and used toward your orator very obscene and abusive language, without any provocation whatever, and frequently refused to prepare your orator's meals, and perform such other household duties as it was incumbent upon her to perform; and, on numerous occasions during the time mentioned, has used personal violence toward your orator, which he did not feel disposed to resent, or even defend himself, on account of her sex; and particularly your orator charges that on or about, etc., at, etc., the said C B, without any provocation whatever, struck your orator a violent blow over the head with a club; and again on or about, etc., the said C B again attacked your orator in their house, and severely beat and bruised him with a chair, and broke the chair in pieces; and that on or about, etc. (*Set forth each act of violence according to the facts.*)

4. And your orator positively avers, that the several acts of cruelty upon the part of the said defendant herein charged, and for which divorce is sought, were all committed without the content, connivance, privity or procurement of your orator, and that this bill is not founded on, or exhibited in consequence of any collusion, agreement or understanding whatever, between the parties hereto, or between your orator and any other person.

Inasmuch, therefore, as your orator is without remedy in the premises, except in a court of equity, your orator prays:

I. That the said C B, who is made party defendant to this bill, may be (without oath, her answer on oath being hereby expressly waived) required to make full and direct answer to the same:

II. That the said marriage between your orator and the defendant may be dissolved by the decree of this court, according to the statute in such case made and provided;

III. That your orator may have such other and further relief in the premises, as equity may require and to this honorable court shall seem meet.

May it please, etc. (*Pray process and add affidavit as in No. 195.*)

No. 201. Bill for divorce, charging extreme cruelty and praying for an injunction, etc.

STATE OF MICHIGAN, } ss.
County of ———.

To the Circuit Court for the County of ———. In Chancery.

1. Your oratrix, of the township of —, in the county of — and State of Michigan, respectfully shows unto the court, that on or about the — day of —, in the year 18—, your oratrix intermarried with one C B, at the —, in the county of —, in the State of —, and that said parties lived and cohabited together as husband and wife, from such time until on or about the — day of —, A. D. 18—.

2. And your oratrix further shows unto the court, that she has resided in this State since said marriage with said defendant, continually, for a period of — year and upwards, immediately preceding the time of exhibiting this her bill of complaint, and that she still resides in, and is an inhabitant of this State.

3. And your oratrix further shows unto the court, that during the time said parties so lived and cohabited together as husband and wife, and up to this, the time of exhibiting this her bill of complaint, your oratrix bore unto the said C B one child, who is now living, whose name and age is as follows, to wit: E B, now aged about — years; and that your oratrix since her intermarriage with the said C B, has always behaved herself toward him as a chaste, dutiful and affectionate wife.

4. And your oratrix further shows unto the court, that the said C B, disregarding the solemnity of his marriage vow, has ever since said marriage been guilty of extreme and repeated cruelty toward your oratrix, that is to say, that the said C B, on divers days and times since said marriage, has beaten, struck, kicked and choked her, and has neglected to furnish her and her said child with proper and necessary food and clothing; and particularly, that on, etc., at their house, the said C B struck your oratrix a violent blow in her face with his fist, knocking her down, and otherwise greatly injuring your oratrix; and that afterward, ou. etc., the said C B again attacked your oratrix, in their said house; kicked, choked and forced her out of said house; and again on, etc., he struck and kicked your oratrix in a violent manner, and otherwise ill treated her; and on, etc. (*insert each act of violence according to the facts*); and on each of said occasions and on numerous other occasions, has used toward your oratrix and her said child, the most obscene, profane and opprobrious language, rendering her life miserable.

5. Your oratrix further represents, that since she left the said C B he has continued to annoy and abuse her; and threatens to take the said child from your oratrix by force, and to kill your oratrix if she refuses to let him take the said child from her; and your oratrix fears and believes that the said C B will carry his threats into execution, unless restrained by the injunction of this honorable court.

6. Your oratrix further represents, that the said C B is possessed of the household furniture and property used by your oratrix and him in keeping house, but now threatens to sell and dispose of the same to prevent your oratrix from obtaining possession thereof; and your oratrix fears and believes he will carry said threat into execution, unless restrained by the injunction of this honorable court.

7. And your oratrix positively avers that the acts done and cause of divorce charged in this bill of complaint, for which divorce is sought, were committed without the consent, connivance, privity or procurement of your oratrix, and that such bill is not founded on, or exhibited in consequence of any collusion, agreement or understanding whatever, between the parties thereto or between your oratrix and any other person.

In consideration whereof your oratrix prays:

I. That the said C B, the defendant hereinbefore named, may without oath (his answer on oath being hereby expressly waived), full, true, direct

and perfect answer make to all and singular the matters hereinbefore stated and charged.

II. That the marriage between your oratrix and the said — may be dissolved, and a divorce from the bonds of matrimony decreed, according to the statute in such case made and provided;

III. That your oratrix may have the care, custody and education of said infant child, the surviving issue of said marriage, until he shall attain the age of fourteen years;

IV. That your honor will decree to your oratrix the household furniture and property of the said C B, and such sums of money to be paid by the said C B to her as your honor may deem necessary and proper, for the maintenance of your oratrix and the said child;

V. That the said C B may be required to pay to your oratrix a sufficient sum of money to enable her to employ counsel and to carry on this suit, and for the support of herself and said child during the pendency thereof;

VI. That the said C B may be restrained by the order and injunction of this honorable court, from selling, assigning, or otherwise disposing of the said household furniture or property, or from in any manner interfering with your oratrix or the said child until the further order of this court;

VII. That your oratrix may have such other and further relief in the premises as equity may require and to this honorable court shall seem meet.

May it please, etc. (*Praying process and for an injunction, and adding affidavit as in No. 195.*)

SECTION XII.

FAILURE TO SUPPORT.

A divorce may be decreed upon the complaint of the wife, when the husband, being of sufficient ability to provide a suitable maintenance for her, shall grossly or wantonly, and cruelly, refuse or neglect so to do, whenever in the opinion of the court the circumstances of the case shall be such that it will be discreet and proper.¹

The power to grant a divorce upon this ground is not exercised by the court except in extreme cases. The failure to support must either be the result of a willful and malicious spirit, or it must proceed from such wanton and cruel neglect as to subvert the marriage relation. Failure to support, means that the man is able to support his wife but will not.

The ability to support, contemplated by the statute, means

¹ Comp. L. 1871, §§ 4739, 4740; 88; *Whitacre v. Whitacre*, 64 Mich. How. St. § 6229; *Brown v. Brown*, 232. 23 Mich. 242; *Page v. Page*, 51 Mich.

something more than mere physical ability.¹ It would seem that the husband should either have property, or the ability and means of earning it. If a man is willing to work, but can find no work to do, and his family suffers in consequence thereof, this would not be such failure to support as would justify a divorce. If a man is lazy, and refuses to work, and his family suffers, this would be "gross, wanton and cruel neglect," and a failure to support.²

The complaining wife must produce in court some evidence of the husband's ability to support her.³

No. 202. Bill for divorce for failure to support.

STATE OF MICHIGAN. }
County of ———. } ss.

To the Circuit Court for the County of ———. In Chancery.

1. Your oratrix, A B, of the township of ———, in the county of ——— and State of Michigan, respectfully shows unto the court, that on or about the ——— day of ———, in the year 18—, your oratrix intermarried with one C D, at the town of ———, in the county of ———, in the State of ———, and that said parties lived and cohabited together, as husband and wife, from such time until on or about the ——— day of ———, A. D. 18—.

2. And your oratrix further shows unto the court, that she has resided in this State since said marriage with said defendant continually, for a period of ——— years and upwards, immediately preceding the time of exhibiting this ——— bill of complaint, and that she still resides in, and is an inhabitant of this State.

3. And your oratrix further shows unto the court, that during the time said parties so lived and cohabited together as husband and wife, and up to this, the time of exhibiting this, her bill of complaint, your oratrix bore unto the said C D two children, who are now living, and whose names and ages are as follows, to wit: E F, aged two years, G H, aged one year.

4. And your oratrix further shows unto the court, that the said C D, disregarding the solemnity of his marriage vow, has for the past six months utterly failed and refused to provide your oratrix with the common necessities of life.

5. That the said C D is strong and healthy, and possessed of good natural abilities, and is well able to earn large wages at his trade of carpenter and joiner, and that during the past six months large sums of money have been paid to the said C D, none of which he has applied to the support of his family, or to their necessities. That he spends most of his time with his

¹ *Washburn v. Washburn*, 9 Cal. 475.

² 1 Bish. Mar. & Divorce, § 820; *Ahrenfeldt v. Ahrenfeldt*, 1 Hoff. 47; *Johnson v. Johnson*, 4 Wis. 135; *Hooper v. Hooper*, 19 Mo. 355; see

also *Mary F. v. Samuel F.*, 1 N. H. 198; *Davis v. Davis*, 37 N. H. 191; *Runker v. Runker*, 96 Mich. 493.

³ *Harteau v. Harteau*, 14 Pick. 181.

boon companions when not at work, coming to his home occasionally, and then staying but a short time.

6. Your oratrix shows that she is in very poor health, and unable to do more than to care for her two young children; that during the past six months she has been obliged to rely upon the charity of neighbors for the common necessities of life. That she has no food in her house, no wood for fire, and that she is utterly destitute of the common necessities of life. That during the past six months, the defendant has done absolutely nothing for the support of his family or for your oratrix.

(If the defendant has means, and alimony is desired, set forth here the amount and nature of his property, and in the prayer for relief, pray for alimony, as in preceding form.)

7. And your oratrix avers, and expressly charges the truth to be, that the said defendant, C D, though of sufficient ability so to do, has grossly, wantonly and cruelly neglected and refused to provide a suitable maintenance for your oratrix, and still does neglect and refuse so to do.

8. And your oratrix positively avers that the acts done, and cause of divorce charged in this bill of complaint, for which divorce is sought, were committed without the consent, connivance, privity or procurement of your oratrix, and that such bill is not founded on, or exhibited in consequence of any collusion, agreement or understanding whatever, between the parties thereto or between your oratrix and any other person.

In consideration whereof, your oratrix prays :

I. That the said C D, the defendant hereinbefore named, may without oath (his answer on oath being hereby expressly waived), full, true, direct and perfect answer make to all and singular, the matters hereinbefore stated and charged.

II. That the marriage between your oratrix and the said C D may be dissolved, and a divorce from the bonds of matrimony decreed, according to the statute in such case made and provided;

III. That your oratrix may have the care, custody and education of said infant children, E F and G H, the surviving issue of said marriage, until they shall respectively attain the age of fourteen years;

IV. That your oratrix may have such other relief, and such further relief in the premises as shall be agreeable to equity and good conscience.

May it please the court, the premises being considered, to grant unto your oratrix, the most gracious writ of subpoena, of the people of the State of Michigan, to be issued out of and under the seal of this honorable court, to be directed to the said C D, therein and thereby commanding him on a certain day, under a certain penalty to be therein inserted, personally to be and appear before this honorable court, then and there to answer all and singular the said premises, and to stand to and abide and perform such order and decree therein, as shall be agreeable to equity and good conscience. And your oratrix will ever pray, etc.

A B.

J W B,
Solicitor for complainant, and of counsel.
(Add verification as in No. 195 ante, page 471.)

SECTION XIII.

DIVORCES GRANTED IN ANOTHER STATE.

The court has discretion, upon application, as in other cases, to divorce from the bonds of matrimony, any party who is a resident of Michigan, and whose husband or wife shall have obtained a divorce in any other State.¹ This power is given the court, to enable it to grant any proper relief when it is necessary to protect property, or other rights, and this, too, without reference to the party taking the first step.²

SECTION XIV.

SUIT TO ANNUL MARRIAGE.

The statute provides³ that when a marriage is supposed to be void, or the validity thereof is doubted, for any of the causes mentioned in the preceding sections,⁴ either party, excepting in cases where a contrary provision is hereinafter made, may file a petition or bill in the Circuit Court of the county where the parties, or one of them, reside, or in the court of chancery, for annulling the same.

Where it is claimed that the marriage is void, it would seem that the bill should be filed, if filed by the wife, in the name she bore previous to the alleged marriage.

On filing a bill or petition to annul a marriage, the proceedings thereon will be the same as in the case of a petition or bill filed for a divorce, and upon due proof of the nullity of the marriage, it will be declared void by a decree or sentence of nullity.⁵

All issues upon the legality of a marriage, except when the marriage is sought to be annulled on the ground of physical incapacity of one of the parties, must be tried by a jury.⁶

¹ Comp. L. 1871, § 4738; How. St. § 6228; *Wright v. Wright*, 24 Mich. 180.

² Comp. L. 1871, § 4739.

³ How. St. § 6225; *Leavitt v. Leavitt*, 13 Mich. 452; *Dawson v. Dawson*, 18 Mich. 335; *Smith v. Smith*, 51 Mich. 607; *Gillett v. Gil-*

lett, 78 Mich. 184; *Nadra v. Nadra*, 79 Mich. 591; *Harrison v. Harrison*, 94 Mich. 559.

⁴ *Ibid.* §§ 6623-4.

⁵ Comp. L. 1871, § 4735; How. St. § 6225; see 1 Edw. 46.

⁶ Comp. L. 1871, § 5068; How. St. § 6622.

Pregnancy before marriage, concealed from the husband, who has not previous to marriage sustained improper relations with the wife, is a fraud which is a sufficient ground for annulling the marriage.¹

SECTION XV.

SUIT TO AFFIRM MARRIAGE.

When the validity of any marriage shall be denied or doubted by either of the parties, the other party may file a bill or petition in the manner provided in suits to annul marriage, for affirming the marriage; and upon due proof of the validity thereof, it will be declared valid by a decree or sentence of the court; and such decree, unless reversed upon appeal, will be conclusive upon all persons concerned.²

SECTION XVI.

VOID MARRIAGES.

All marriages which are prohibited by law on account of consanguinity or affinity between the parties, or on account of either of them having a former wife or husband then living; all marriages solemnized when either of the parties was insane or an idiot, and all marriages between a white person and a negro, will, if solemnized within this State, be absolutely void, without any decree of divorce or other legal process.³ But, in the case of a bill filed by a lunatic after his restoration to reason, if it appears that the parties freely cohabited as husband and wife after the lunatic was restored to mind, no divorce will be granted.⁴

In the case of a marriage solemnized when either of the parties was under the age of legal consent, if they shall separate during such non-age, and not cohabit together afterward, or in case the consent of one of the parties was obtained by

¹ *Harrison v. Harrison*, 94 Mich. 561; *Sissung v. Sissung*, 65 Mich. 180.

² Comp. L. 1871, § 4736; How. St. § 6226.

³ Comp. L. 1871, § 4733; How. St. § 6223.

⁴ Comp. L. 1871, § 4768; How. St. § 6256.

force or fraud, and there shall have been no subsequent voluntary cohabitation of the parties, the marriage will be deemed void, without any decree of divorce or other legal process.¹ If, after the alleged force or fraud, the parties voluntarily cohabit as husband and wife, the marriage will not be annulled.²

When persons are married, one of whom is over and the other is under the age of consent, the former by the statute is bound by the marriage, unless they separate by consent before the other reaches lawful age, or do not cohabit afterward, or unless the other refuses consent on arriving at that age. And a second marriage by the former, in the absence of mutual separation, or of such refusal to consent, is bigamy.³

By the "age of consent," is meant in males eighteen years, and in females sixteen years.⁴

When either party shall be sentenced to imprisonment for life in any prison, jail or house of correction, the marriage will be thereby absolutely dissolved, without any decree of divorce or other legal process, and no pardon granted to the party so sentenced will restore the party to his or her conjugal rights.⁵

A second marriage, while the first remains undissolved by death or divorce, is, by the common law, null and void.⁶ But to render the second marriage null, the first must be valid.⁷

A husband is not entitled to a decree of nullity of marriage on the ground that the former husband of his wife obtained a divorce by her fraudulent collusion.⁸

SECTION XVII.

REFERENCE TO TAKE PROOFS.

If any bill for divorce is taken as confessed, or the facts charged are admitted by the answer, the complainant may,

¹ Comp. L. 1871, §§ 4734, 4766; 472; *Gaines v. Hennen*, 24 How. U. S. 554; *Carre v. Carre*, 2 Yeates, 207; 2 Kent's Com. 79; Bishop on Mar. and Div. § 205.

² Comp. L. 1871, § 4769; Ibid. § 6257.

³ *People v. Slack*, 15 Mich. 193.

⁴ Comp. L. 1871, § 4719.

⁵ Comp. L. 1871, § 4737; How. St. § 6227.

⁶ *Gaines v. Relf*, 12 How. U. S.

⁷ 2 Add. 471; 2 Eng. Eccl. R. 381; 12 Jur. 174; 11 Queen's B. Rep. 173.

⁸ *Kinnier v. Kinnier*, 53 Barb. N. Y. 454.

upon due proof by affidavit of the regularity¹ of the proceedings to take the bill as confessed, or upon the bill and answer, have an order of course,² entered for a reference to a commissioner, to take proofs of all the material facts charged in the bill, and to report such proof to the court,³ with his opinion thereon. And on such reference it shall be the duty of the commissioner, in addition to the questions put by the parties, to make such full inquiries of the person sworn, as shall be necessary to arrive at the material facts of the case.⁴

Examination of witnesses by circuit court commissioner.—A circuit court commissioner's examination of the parties to a divorce suit should be in the presence, or under the immediate supervision of the judge, so that it may be kept within proper limits; and as it is discretionary with the judge to allow such an examination, he can prevent anything unfair or unseemly in conducting it.⁵

Questions to be asked.—In all suits for divorce, if any of the testimony in the case is taken before a circuit court commissioner or by stipulation before any other officer, it shall be the duty of such commissioner, or other officer, to ask of each and every witness sworn by and before him in such cause the following question which shall be reduced to writing in the testimony: "Do you know any fact, matter or circumstance, which will in any way tend to weaken complainant's case for divorce? If so, state the same particularly and fully;" and the answer of the witness to such question shall be reduced to writing by the said commissioner, or other officer, *verbatim* as far as possible, and the question and answer shall be returned to the court with the other testimony in the case.⁶

SECTION XVIII.

INJUNCTIONS IN.

The statute provides that "after the exhibition of a bill or petition in a suit to annul a marriage, or for divorce or sepa-

¹ Form No. 17; Chan. Rule 29.

² Form No. 18; Chan. Rule 29.

³ Form No. 19; Chan. Rule 29.

⁴ Chancery Rule 96; see Rule 29, and *Emmons v. Emmons*, Walk.

Ch. 532; Walk. Ch. 48, and 16 Mich. 79.

⁵ *Page v. Page*, 51 Mich. 88; *Stuart v. Stuart*, 47 Mich. 90.

⁶ How. Sup. St. § 6263a.

ration, the court may at any time, either in term time or vacation, on petition of the wife, prohibit the husband from imposing any restraint upon her personal liberty during the pendency of the suit."¹

Independent of this statute, the court has power to restrain the husband from disposing of or incumbering his property.²

It may be stated, as a general rule, that pending proceedings for a divorce, upon a proper case shown, the husband may be restrained from interfering with the custody of the children, or of property in the possession of the wife.³ So a husband will be enjoined from disposing of his property in such manner as to prevent the wife from obtaining alimony or a separate maintenance, on a bill pending for that purpose.⁴

Mere apprehension of abandonment by the husband, and a failure to support the wife, is not sufficient cause to warrant the interposition of equity in restraining him from disposing of his property, since injunctions are not usually allowed upon mere apprehensions of future wrong.⁵ And where a preliminary injunction has been allowed in such a case, it will be dissolved on the coming in of the answer denying any intention on the part of the husband to abandon the wife.⁶

An injunction may be obtained by the wife to restrain the husband from incumbering as well as from selling his property.⁷ But the wife will not be allowed in such case to restrain the husband from using his property for the support of himself and his children, nor will he be enjoined from using the tools and implements of his trade, or from carrying on his ordinary business.⁸

On granting a decree of divorce in favor of the wife, it is improper to perpetually enjoin the husband from selling his property to insure the payment of alimony.⁹

¹ Comp. L. 1871, § 4746; How. St. § 6236.

² See High on Injunctions, for full discussion.

³ *Wilson v. Wilson*, Wright, O. Ch. 129; *Edwards v. Edwards*, Ib. 308.

⁴ *Questel v. Questel*, Wright Ch. 492; *Johnston v. Johnston*, Ib. 454; *Bascomb v. Bascomb*, Ib. 632; *Rick-*

etts v. Ricketts, 4 Gill, 105; High on Inj. § 843.

⁵ *Anshutz v. Anshutz*, 1 C. E. Greene, N. J. 162.

⁶ High on Inj. § 844; *Anshutz v. Anshutz*, 1 C. E. Greene (N. J.) 162.

⁷ *Vanzant v. Vanzant*, 23 Ill. 536.

⁸ *Rose v. Rose*, 11 Paige Ch. 166; High on Inj. § 845.

⁹ *Erissman v. Erissman*, 25 Ill. 136.

SECTION XIX.

DEFENSES.

The defendant may appear, except, demur, plead or answer the bill of complaint, as in other cases in chancery.

The defendant may set up in his answer, the adultery of the complainant, or any other matter which would be a bar to a divorce, separation or the annulling of the marriage contract; and if an issue is taken thereon, it will be tried at the same time and in the same manner as other issues of fact in the cause.'

Condonation.—In any suit brought for a divorce on the ground of adultery, although the fact of adultery be established, the court may deny a divorce in the following cases:

First. When the offense shall appear to have been committed by the procurement, or with the connivance of the complainant.

Second. When the offense charged shall have been forgiven by the injured party, and such forgiveness be proved by express proof, or by the voluntary cohabitation of the parties, with the knowledge of the offense.

Third. When there shall have been no express forgiveness, and no voluntary cohabitation of the parties, but the suit shall not have been brought within five years after the discovery by the complainant of the offense charged.²

If the injured party cohabits with the other subsequent to an adulterous offense, having the ability to prove the offense, it will be a bar to a proceeding for divorce.³ But the effect of cohabitation, as condonation of adultery, is less binding upon the wife than upon the husband.⁴ And condonation is

¹ See How. St. § 6234.

² Comp. L. 1871, § 4773; How. St. § 6261.

³ *Davis v. Davis*, 19 Ill. 334; *Williamson v. Williamson*, 1 Johns. Ch. 488; *Johnson v. Johnson*, 14 Wend. 637; S. C., 4 Paige Ch. 460; S. C., 1 Edw. Ch. 439; *Phillips v. Phillips*, 4 Blackf. 131; *Hall v. Hall*, 4 N. H. 462; *Deliber v. Deliber*, 9 Conn. 233; *Anon. Ib.* 147; *North v. North*, 5 Mass. 320; *Quincy v. Quincy*, 10 N.

H. 272; *Master v. Master*, 15 N. H. 159; *Buckholts v. Buckholts*, 24 Geo. 238; *Armstrong v. Armstrong*, 3 George, Miss. 279; *Twyman v. Twyman*, 27 Mo. 333; *Marsh v. Marsh*, 2 Beasley, N. J. 281; *Trumbull v. Trumbull*, 23 Ark. 615.

⁴ *Johnson v. Johnson*, 1 Edw. Ch. 439; *Armstrong v. Armstrong*, 3 George, Miss. 279; *Hollister v. Hollister*, 6 Barr. 449.

always accompanied with the implied condition that the injury shall not be repeated. Thus, cruelty of an aggravated character may revive the offense of adultery impliedly condoned, and when properly brought to the knowledge of the court, during the pendency of a suit for a divorce for adultery, will authorize a decree for a divorce.¹

Condonation of the adultery is a conditional forgiveness of the offense, and a repetition of the adultery revives the offense.²

Cohabitation, after extreme and repeated cruelty, is not a bar to divorce for that cause, although it is so in cases of adultery. The distinction between the cases seems to be founded on a just conception of the conjugal relations.³ Although it has been held that where a wife continued to live with her husband after acts of violence, it is proof that she did not consider herself in danger.⁴

Condonation on the part of the wife is not pressed with the same rigor as condonation on the part of the husband; yet where the wife has forgiven the husband for injuries inflicted upon her, and the parties have become reconciled, courts are averse to listen to the old grounds of complaint.⁵

Other defenses.—The statute does not require an answer to be sworn to, but provides that it need not,⁶ and is different from the general chancery practice in that respect. The statute having dispensed with such oath, the defendant acquires no advantage by swearing to his answer in such a case. Such a sworn answer has no more effect than the bill, and is not evidence.⁷ But a verified answer may be read as an affidavit on a motion for alimony *pendente lite*.⁸

If the complainant is not a resident of the county where the suit is brought, and that fact does not appear upon the face of

¹ *Davis v. Davis*, 19 Ill. 334; *Odom v. Odom*, 36 Geo. 286; *Armstrong v. Armstrong*, 27 Ind. 186; *Farnham v. Farnham*, 73 Ill. 497.

² *Smith v. Smith*, 4 Paige Ch. 432; *Johnson v. Johnson*, Ib. 460; *Collier v. Collier*, 1 Dev. 352.

³ *Hollister v. Hollister*, 6 Barr. 449; *Whispell v. Whispell*, 4 Barb. 217; *Reese v. Reese*, 23 Ala. 785; *Nogees v. Nogees*, 7 Texas, 533.

⁴ *Griffin v. Griffin*, 8 B. Monr. 120; see *Phillips v. Phillips*, 1 Bradwell App. Ct. R. 245.

⁵ *Davies v. Davies*, 55 Barb. 130; *Bowie v. Bowie*, 3 Md. Ch. Decis. 51; *Sterling v. Sterling*, 12 Geo. 201.

⁶ Comp. L. 1871, § 4743; How. St. § 6233.

⁷ *Conesey v. Conesey*, 60 Ill. 180.

⁸ *Anthony v. Anthony*, 3 Stockt. N. J. 70.

the bill, the objection can only be raised by a plea. If a defendant proceeds to answer the bill, the objection of want of jurisdiction is waived.¹

Nothing in an answer will be considered as impertinent which tends to show the conduct of either party against the other. In addition to a denial of the treatment alleged in the bill, the defendant may allege, in his answer, conduct on the part of the complainant calculated to irritate and provoke him, and to excite his jealousy or alienate his affections from her.²

Recrimination.—A husband can not resist a divorce for adultery by setting up desertion by the wife; nor can a wife set up cruelty of the husband as a defense to a bill filed against her for adultery.³

Where a husband and wife each file a bill for divorce, the one for cruelty and the other for adultery, and both the charges are sustained, each will be considered a bar to the other, and a divorce will be denied to both.⁵

If a party seeking a divorce on the ground of adultery has been guilty of the same offense, either before or after the offense committed by the other, it is a conclusive bar to the suit.⁶ But proof of adultery on the part of the complainant is no bar to a divorce grounded on the subsequent adultery of the defendant, if there has been an intervening condonation of the complainant's offense.⁷

Cross-bills.—Cross-bills can be, and are, resorted to in divorce, as well as other chancery cases, to obtain affirmative relief, but in Michigan affirmative relief may be had upon answer.⁸

¹ *Parker v. Parker*, 61 Ill. 369.

² *Hopper v. Hopper*, 11 Paige Ch. 46.

³ *Quincy v. Quincy*, 10 N. H. 272; *Wood v. Wood*, 5 Ired. Eq. 674; but see *Allen v. Allen*, 4 Allen, Mass. 39.

⁴ *Betz v. Betz*, 2 Rob. N. Y. 694; *Monk v. Monk*, 7 Rob. N. Y. 153.

⁵ *Hoff v. Hoff*, 48 Mich. 281; *Ribet v. Ribet*, 39 Ala. 348.

⁶ How. St. Sup. § 6233; *Smith v.*

Smith, 4 Paige Ch. 432; *Pastoiot v. Pastoiot*, 6 Mass. 276; *Christianberry v. Christianberry*, 4 Blackf. 203; *Mattox v. Mattox*, 2 Ham. O. 233; *Holmes v. Holmes*, Walk. Miss. 474; *Burdell v. Burdell*, 2 Barb. 473; *Leseuer v. Leseuer*, 31 Barb. 330; *Clapp v. Clapp*, 97 Mass. 531.

⁷ *Master v. Master*, 15 N. H. 159.

⁸ Chan. Rule 11.

SECTION XX.

HEARING AND DECREE.

Forming an issue.—The statute provides that suits to annul or affirm a marriage, or for a divorce, shall be conducted in the same manner of other chancery cases.¹ This being true, the court may award issues to be tried by a jury. And it is especially provided by statute, that all issues upon the legality of a marriage, except where a marriage is sought to be annulled on the ground of physical incapacity of one of the parties, *must* be tried by a jury.² This section requiring the issue raised upon the bill to annul a marriage to be tried by a jury, is not mandatory, but secures to either party the right to a jury, unless it is waived. And it will be considered as waived if, after a replication is filed, a motion is not made by one party on notice to the other for a feigned issue.

Issues awarded to be tried by jury must be confined not only to facts put in issue by the pleadings, but to facts concerning which some testimony has already been introduced and read at the hearing.³ As a general thing, an issue can only be granted at the hearing.⁴

It would tend to promote justice, and aid the court in its decree, if the jury were instructed to find on each issue raised by the pleadings and proof, instead of finding a general verdict.⁵

The issues, if there be more than one, should be distinct and explicit, presenting in each a single question, so clearly that it can not be misunderstood by the jury, and their verdict should be responsive to each.⁶

No. 203. Order directing issues of fact to be tried by a jury in a divorce suit.

(Caption and title of cause as in No. 204 post, page 510.)

In this cause it is ordered, that upon the pleadings filed in this cause, the following issues of fact be submitted to and tried by the jury, to wit :

¹ Comp. L. 1871, § 4744; How. St. § 6234.

² Comp. L. 1871, § 5068; How. St. § 6622.

³ *Dunn v. Dunn*, 11 Mich. 284.

⁴ *Ibid.*

⁵ *Erissman v. Erissman*, 25 Ill. 136.

⁶ *Von Glahn v. Von Glahn*, 46 Ill. 134.

1. Has the defendant committed adultery subsequently to his marriage with the complainant, in manner and form as charged in the bill?

2. Has the defendant been guilty of extreme and repeated cruelty toward the complainant in manner and form as charged in the bill?

(Let the questions correspond with the issues presented by the pleadings.)

Proofs.—In all cases of divorce, whether at issue, or standing on the bill taken as confessed, the court may call upon the complainant, or any witness thereto, to testify orally in open court; and may make all necessary orders to secure the attendance of such party or witness, and may suspend the hearing of the cause from time to time, as often as may be necessary to secure such attendance. No proofs or testimony can be taken, however, until four months after the filing of the bill except when the cause is desertion.¹ In case of the neglect or refusal of the complainant to attend and testify, the court may dismiss the bill in the same manner as though said complainant had made default at the hearing.² This rule is not suspended by the statute,³ which provides that neither husband nor wife shall be examined as a witness for or against the other, with the other's consent.⁴

When marriage is averred in the bill, and is confessed or not denied by the answer, it may be considered that an issue on this allegation is waived.⁵

A court has no authority to decree a divorce on a bill taken for confessed, without proof to sustain its allegations. The court may, under the statute, examine witnesses orally in court, or it may, under its general chancery powers, refer the cause to the master to take proofs, or depositions in writing may be used; but in some way the facts, to justify granting the divorce, must be proven to the court.⁶

And it is provided by rule that no sentence or decree of nullity, declaring void a marriage contract, or decree for a divorce, or for a separate or limited divorce, shall be made of course by the default of the defendant; or in consequence of

¹Public Laws 1895, p. 371; How. St. Supp. § 6231.

²*Milk v. Moore*, 39 Ill. 588.

³Law Rule 25.

⁴Comp. L. 1871, § 5969; How. St. Supp. § 7148.

⁵*Harman v. Harman*, 16 Ill. 85,

⁶*Sawyer v. Sawyer*, Walk. Ch. 48; *Robinson v. Robinson*, 16 Mich. 79; *Dawson v. Dawson*, 18 Mich. 335; *Porritt v. Porritt*, 18 Mich. 426; *Bishop v. Bishop*, 17 Mich. 217; *Shillinger v. Shillinger*, 14 Ill. 147.

any neglect to appear at the hearing of the cause, or by consent. And every such cause shall be heard after the trial of the issue, or upon the coming in of the commissioner's report, at a stated term of the court.¹

In proceedings for a divorce, where the bill is taken for confessed, it is sufficient that the record shows proof was heard sustaining the allegations of the bill, without preserving the evidence in the record.²

When there is nothing to hinder a party from taking his proofs within the time allowed by the rules, and from cross-examining the witnesses of his opponent, and he neglects to do so, he can not obtain leave afterward to bring in contradictory testimony without a strong showing that justice requires it; and that he has not been so far in fault as to have forfeited his claim to favor.³

Testimony of matters largely drawn out by leading questions, and going but slightly, if at all, beyond the points suggested by them, deserve in divorce cases but very little credence.⁴

It is a provision of the statute upon divorce, that no decree of divorce shall be made solely upon the declarations, confessions or admissions of the parties; but the court shall in all cases require other satisfactory evidence of the facts alleged in the bill for that purpose; but either party may, if he or she elect, testify in relation to such facts, but in open court only, and that such testimony shall not be received in support or defense of a charge of adultery.⁵

Decree.—A divorce entered within two weeks after the cause was brought to issue, there being no showing that the same was brought on to be heard by stipulation, or that the defendant was present at the hearing, or had notice of the same, was held to be prematurely entered.⁶ Where an answer is filed

¹ Chancery Rule 29 d; *Robinson v. Robinson*, 16 Mich. 79; *Brisk v. Brisk*, 65 Mich. 230; *Owen v. Yale*, 75 Mich. 257.

² *Davis v. Davis*, 30 Ill. 180; *Hawes v. Hawes*, 33 Ill. 287; *Shillinger v. Shillinger*, 14 Ill. 147.

³ *McClung v. McClung*, 40 Mich.

293; *Thayer v. Swift*, Walk. Ch. 384.

⁴ *Richards v. Richards*, 48 Mich. 530.

⁵ How. St. § 6260; see *Cross v. Cross*, 55 Mich. 282; *Page v. Page*, 51 Mich. 90.

⁶ *McKinney v. McKinney*, 36 Mich. 37.

but is afterward withdrawn, divorce should not be allowed without a satisfactory showing that the withdrawal was voluntary and not collusive.¹

When the complainant specially avers in his bill that the acts were not done without connivance and collusion, he can not, after decree, be heard in a proceeding to vacate the decree on the ground that the divorce was the result of collusion.² To justify a decree on the ground of fraud, it must be such as to negative consent, without reference to previous inducement. The fraud must be nearly coincident with the time of marriage.³

Wife entitled to dower.—When the marriage shall be dissolved by the husband being sentenced to imprisonment for life, and when a divorce shall be decreed for the cause of adultery committed by the husband, or for the misconduct or habitual drunkenness of the husband, or on account of his being sentenced to imprisonment for a term of three years or more, the wife shall be entitled to her dower in his lands, in the same manner as if he were dead; but she shall not be entitled to dower in any other case of divorce.⁴

Children, legitimacy of.—When a marriage is dissolved on account of a prior marriage of either party, and it shall appear that the second marriage was contracted in good faith, and with the full belief of the parties that the former wife or husband was dead, that fact shall be stated in the decree of divorce or nullity; and the issue of such second marriage, born or begotten before the commencement of the suit, shall be deemed to be the legitimate issue of the parent who, at the time of the marriage, was capable of contracting.⁵

Upon the dissolution of a marriage on account of the non-age, insanity or idiocy of either party, the issue of the marriage will be deemed to be in all respects the legitimate issue of the parent who, at the time of the marriage, was capable of contracting.⁶

¹ *Leavitt v. Leavitt*, 13 Mich. 452.

² *Simons v. Simons*, 47 Mich. 253.

³ *Leavitt v. Leavitt*, 13 Mich. 452.

⁴ Comp. L. 1871, § 4763; How. St. § 6246; *Jordan v. Jordan*, 53 Mich. 552; *Percival v. Percival*, 53 Mich. 297; *Bowen v. Hoard*, 39 N. W. R. 27;

Rea v. Rea, 63 Mich. 269; *Owen v. Yale*, 75 Mich. 256.

⁵ Comp. L. 1871, § 4764; How. St. § 6251.

⁶ Comp. L. 1871, § 4770; How. St. § 6250.

If there shall be any issue of a marriage annulled on the ground of force or fraud, the court will decree their custody to the innocent parent, and may also make provision for their education and maintenance out of the estate and property of the guilty party.¹

Where a decree of divorce is granted for the cause of adultery committed by the wife, it will not affect the legitimacy of the issue of the marriage, but the legitimacy of such children, if questioned, may be determined by the court upon the proofs in the cause; and in every case, the legitimacy of all children begotten before the commencement of a suit, will be presumed until the contrary is shown.²

Children, custody of.—The court may, on the application of either party, make such order concerning the care and custody of the minor children of the parties, and their suitable maintenance during the pendency of such suit, as shall be deemed proper and necessary, and for the benefit of the children.³

Upon pronouncing a sentence or decree of nullity of a marriage, and also upon decreeing a divorce, whether from the bond of matrimony, or from bed and board, the court may make such further decree as it shall deem just and proper, concerning the care, custody and maintenance of the minor children of the parties, and may determine with which of the parents the children, or any of them, shall remain.⁴

The court may, from time to time, after decree, on the petition of either of the parents, revise and alter such decree concerning the care, custody and maintenance of the children, or any of them, and make a new decree concerning the same, as the circumstances of the parents, and the benefit of the children shall require.⁵ But no new decree will be made upon a petition exhibiting only such facts as were within the knowledge of the petitioner before the decree was entered, and which were appropriate to be considered in making the decree.⁶ A father is under legal obligation to provide for the support

¹ How. St. § 6258.

² How. St. § 6249.

³ Comp. L. 1871, § 4747; How. St. § 6237; *Klein v. Klein*, 47 Mich. 518. See How. St. § 6294.

⁴ Comp. L. 1871, § 4748; *Ibid.* 6238.

⁵ How. St. § 6239.

⁶ *Chandler v. Chandler*, 24 Mich. 176; *Perkins v. Perkins*, 12 Mich. 458.

of his children, even if they remain with the mother, after divorce.¹ In case of separation of husband and wife, the wife is entitled to the custody of all children under twelve, and the husband of all children of twelve years and upwards. But the Circuit Court in chancery may make such orders concerning the care and custody of children as it deems just.²

Restoration of property to wife.—Whenever the nullity of a marriage, or a divorce from the bond of matrimony for any cause excepting that of adultery committed by the wife, shall be decreed, and when the husband shall be sentenced to imprisonment for life, and also upon every divorce from bed and board, the wife shall be entitled to the immediate possession of all her real estate, in like manner as if her husband were dead.³

Upon every such dissolution of a marriage as is specified in the preceding paragraph, and also upon every divorce from bed and board, the court may make a further decree for restoring to the wife the whole, or such part as it shall deem just and reasonable, of the personal estate that shall have come to the husband by reason of the marriage, or for awarding to her the value thereof, to be paid by her husband in money.⁴

Upon every divorce for adultery committed by the husband, and upon every divorce from bed and board for any cause, when any personal estate of the wife, or money in lieu thereof, shall be awarded to her, as provided in the preceding paragraph, the court, instead of ordering the same to be delivered or paid into the hands of the wife, may order it to be delivered or paid into the hands of a trustee or trustees, to be appointed by the court, upon trust to invest the same, and to apply the income thereof to the support and maintenance of the wife, and of the minor children of the marriage, or any of them, in such manner as the court shall direct.⁵

¹ *Courtright v. Courtright*, 40 Mich. 633.

² How. St. 6237-8; *Courtright v. Courtright*, 40 Mich. 633; *Flory v. Ostrom*, 92 Mich. 622; *Taylor v. Taylor*, 73 Mich. 266.

³ Comp. L. 1871, § 4750; H. S.

§ 6240; *Johnson v. Johnson*, Walk. Ch. 313.

⁴ Comp. L. 1871, § 4751; H. S. § 6241; *Harrison v. Harrison*, 94 Mich. 559.

⁵ Comp. L. 1871, § 4752; H. S. § 6242.

Such trustees shall also pay over the principal sum to the wife and children of the marriage, when ordered by the court, in such proportions, and at such times as the court shall direct, regard being had, in the disposition of the said income, as well as of the principal sum, to the situation and circumstances of the wife and children; and the said trustees shall give such bonds as the court shall require, for the faithful performance of their trust.¹

Whenever the court shall think proper to award to the wife any of her personal estate, or any money in lieu thereof, in pursuance of the foregoing provisions, such court may require the husband to disclose on oath what personal estate has come to him by reason of the marriage, and how the same has been disposed of, and what portion thereof still remains in his hands.²

Upon petition by either of the parties, the court may, from time to time, revise and alter its decree respecting the appropriation and payment of the principal and income of the property so held in trust, and may make any decree respecting any of the said matters which such court might have made in the original suit.³

The court has no jurisdiction to settle the claims of a wife against her husband for her separate property in a suit by her against him for a divorce.⁴

Costs.—The court has power to decree costs, and to enforce its decree as in other cases.⁵ When the wife has no separate estate, costs will not be awarded against her.

Cohabitation after divorce.—If parties cohabit together after divorce, they are guilty of adultery.⁶

¹ Comp. L. 1871, § 4753; How. St. § 6243.

² Comp. L. 1871, § 4754; How. St. § 6244.

³ Comp. L. 1871, § 4760; How. St. § 6248; *Jordan v. Westerman*, 62 Mich. 179.

⁴ *Letts v. Letts*, 73 Mich. 139; *Peck v. Peck*, 66 Mich. 586; *Uhl v. Uhl*, 52 Cal. 250.

⁵ Comp. L. 1871, § 4744; How. St. § 6234.

⁶ Comp. L. 1875, § 4765; How. St. § 6253.

No. 204. Decree for divorce pro confesso, with custody of children.

STATE OF MICHIGAN.

The Circuit Court for the County of ——. In Chancery.

A B,	}
Complainant,	
vs.	
C D,	}
Defendant.	

At a session of said court, held at the court house in the city of —, in said county, on the — day of —, in the year one thousand eight hundred and —.

Present, Hon. A J M, Circuit Judge.

This cause having been brought on to be heard upon the bill of complaint filed therein, taken as confessed by the defendant, and upon the report of J M D, esquire, one of the circuit court commissioners for said county of —, to whom it was referred, by an order heretofore entered therein, to take proofs of the material facts charged in such bill of complaint; thereupon, on reading the bill of complaint, the report of such circuit court commissioner, and the proofs accompanying the same, together with the opinion of said circuit court commissioner upon such proofs, from which it satisfactorily appears to this court, that the material facts charged in such bill of complaint are true, and that the defendant, C D, has been guilty of the several acts of cruelty therein charged, and, also, that he is an unsuitable person to have the care, custody and education of the minor child, E F, the issue of their said marriage, and that the complainant, A B, is a suitable person to have the care, custody and education of said minor child, E F; on motion of J L H, esquire, of counsel for said complainant, it is ordered, adjudged and decreed, and this court, by virtue of the authority therein vested, and in pursuance of the statute in such case made and provided, doth order, adjudge and decree, that the marriage between the said complainant, A B, and the said defendant, C D, be dissolved, and the same is hereby dissolved accordingly, and a divorce from the bonds of matrimony, between said parties, is also adjudged and decreed. And it is also further ordered, adjudged and decreed, that said complainant, A B, shall have the care, custody and education of the said minor child, E F, aged — years, — months and — days, the issue of said marriage between said parties, mentioned and named in the bill of complaint in this cause, and that said minor child, E F, shall remain with said complainant, A B, until said child shall attain the age of fourteen years.

A J M,
Circuit Judge.

(Countersigned)

T F G, Register.

No. 205. Decree for divorce upon pleadings and proofs.

(Caption and title of cause, as in No. 204.)

This cause came on to be heard upon pleadings and proofs filed therein, and after hearing read the said pleadings and proofs, and after hearing arguments by —, solicitor for the above named complainant, and —, solicitor for defendant, and after due consideration of said pleadings, proofs

and the argument of counsel, and the court being fully advised in the premises, on consideration thereof, doth find that all the material facts alleged in the said bill are true, and that the defendant has committed adultery subsequently to his marriage with the complainant; and that he is a person wholly unfit to have the care, custody, control or education of children.

It is therefore ordered, adjudged and decreed by the court, that the marriage between the complainant and defendant be dissolved, and the same is hereby dissolved, accordingly; and the parties are, and each of them is, freed from the obligations thereof.

It is further ordered, adjudged and decreed by the court, that the complainant have the care, custody, control and education of the said children, to wit, C B and C D, without any interference on the part of the defendant, until the further order of this court.

It is further ordered, that the defendant pay the costs of this suit, and that execution issue therefor. And the court reserves the consideration of alimony for a future order and decree herein.

A J M,
Circuit Judge.

(Countersigned)

T R G, Register.

The above form can be varied to suit the particular case. The court, when it thinks proper, can dispose of the question of alimony at the hearing, and this is usually done in Michigan.

No. 206. Decree for divorce on the ground of extreme cruelty upon verdict of a jury.

(Caption and title of cause as in No. 204, ante.)

This cause having come on to be heard upon the bill of complaint herein, the answer of the defendant thereto, and the replication of the complainant to such answer; and a jury having been called, selected and sworn, to wit: (*Here insert the names of the jurors*) to try the issue herein, viz: whether the defendant has been guilty of extreme cruelty toward the complainant, in manner and form as charged in the complainant's bill of complaint; and the said trial having proceeded, and the said jury having heard the evidence offered by the respective parties, and the arguments of counsel, found the said issue in the affirmative.

It is therefore ordered, adjudged and decreed by the court, that the marriage between the complainant and the defendant be dissolved, and the same is hereby dissolved accordingly; and the said parties are, and each of them is, freed from the obligations thereof. And the court not being sufficiently advised as to the question of alimony in said cause, does reserve the consideration thereof, until a future and further hearing thereon.

A J M,
Circuit Judge.

(Countersigned)

T F G, Register.

SECTION XXI.

ALIMONY AND EXPENSES.

Alimony is either temporary or permanent. Temporary alimony is that granted *pendente lite*.

Alimony *pendente lite* is a common law right, and courts of chancery are bound to enforce it as much as any other provision of the common law.¹

When a suit is pending for a divorce, it is legally improper for the parties to cohabit together.* This single fact, therefore, is sufficient to entitle the wife, who has not sufficient property of her own, whether complainant or defendant, to alimony during its pendency.³ Upon the same principle, the husband, who has all the money, while the wife has none, is bound to furnish her, whether plaintiff or defendant, with the means to defray her expenses in the suit; otherwise she would be denied justice.⁴

The merits of the controversy between the parties can not be determined on a motion for alimony and expenses. Whether in fact a decree for divorce ought to be granted can only be properly determined on the final hearing. Probable cause for the suit, the wife's necessities and the husband's ability, are the controlling considerations in determining whether alimony *pendente lite* and suit money will be allowed.⁵

Where the wife has sufficient separate property of her own, the reason for giving her either temporary alimony, or money to defray her expenses in the suit does not exist, and she will not be entitled to either.⁶

¹ *Story v. Story*, Walk. Ch. 421; *Petrie v. The People*, 40 Ill. 334; see *Dinet v. Pfirsching*, 86 Ill. 83.

² *Sullivan v. Sullivan*, 2 Add. 299; 2 Eng. Eccl. R. 314; *Clowes v. Clowes*, 9 Jur. 356; Bishop on Mar. and Div. § 527.

³ *Jones v. Jones*, 2 Barb. Ch. R. 146; *Holmes v. Holmes*, Walker, Ch. R. 474; *Wilson v. Wilson*, 2 Hagg. Ch. R. 203; *Armstrong v. Armstrong*, 35 Ill. 109.

⁴ *D'Aguilar v. D'Aguilar*, 1 Hagg.

Ch. R. 773; 3 Eng. Eccl. R. 329, 338; 6 Eng. Eccl. R. 372; *Holmes v. Holmes*, Walker, Ch. R. 474; *Holmes v. Holmes*, 2 Lee, 90; *Turst v. Turst*, 2 Lee, 92; *Armstrong v. Armstrong*, 35 Ill. 109; *Logan v. Logan*, 2 B. Monr. 142; *Rose v. Rose*, 11 Paige Ch. 166; *Newman v. Newman*, 69 Ill. 167.

⁵ *Burgess v. Burgess*, 25 Ill. App. Ct. R. 525; *Filer v. Filer*, 77 Mich. 469.

⁶ *Ross v. Ross*, 45 Mich. 185; *Story*

The allowance of alimony *pendente lite*, the amount thereof, and time and manner of payment, is discretionary with the court.¹ It is therefore necessary that a meritorious case be presented for its consideration.

The court will seldom deny alimony to the wife when she is made defendant. If a man brings suit against his wife, he should be prepared to furnish her means for her defense.

It is provided by statute, that in every suit, brought either for a divorce or for separation, the court may, in its discretion, require the husband to pay any sums necessary to enable the wife to carry on or defend the suit during its pendency. And it may decree costs against either party, and award execution for the same, or it may direct such costs to be paid out of any property sequestered or in the power of the court, or in the hands of a receiver.²

The possession by a wife of non-productive property, or property not available in her hands to obtain the necessary means to prosecute a suit for divorce, will not prevent the allowance of temporary alimony.³

The statute clearly indicates that the proceedings are to be maintained at the cost of the wife unless the court shall relieve her of such cost by an order for expense money to be paid by her husband.⁴

How obtained.—The wife must apply to the court by special motion or petition. If adultery is charged against her, she must deny, in her petition, the truth of the same, or show a valid defense of condonation.⁵ The petition must allege that the wife has no means of her own.⁶ The petition must be sworn to; it must state positively and specifically the means and ability of the husband, as well as the situation of the wife. A copy of the petition must be served upon the solicitor of the opposite party, with notice, which must not be

v. *Story*, Walk. Chan. 421; *Bish. on Mar. and Div.* § 572; *Thompson v. Thompson*, 79 Mich. 124.

¹ *Bergen v. Bergen*, 22 Ill. 187; *Rossman v. Rossman*, 62 Mich. 429; *Law v. Mills*, 61 Mich. 35; *Berryman v. Berryman*, 59 Mich. 605; *Johnson v. Johnson*, 125 Ill. 510; *Foss v. Foss*, 100 Ill. 576.

² *Comp. L.* 1871, § 4745; *How. St.* § 6235.

³ *Potts v. Potts*, 68 Mich. 492.

⁴ *Wolcott v. Patterson*, 100 Mich. 227.

⁵ *Osgood v. Osgood*, 2 Paige, 261.

⁶ *Ross v. Ross*, 47 Mich. 185; *Story v. Story*, Walk. Ch. 421.

less than four days, of the time when the application will be presented to the court.'

No. 207. Petition for alimony pendente lite, and expenses.

STATE OF MICHIGAN.

The Circuit Court for the County of ——. In Chancery.

A B,	}
Complainant,	
vs.	
C D,	}
Defendant.	

To the Circuit Court for the County of ——. In Chancery.

1. The petition of C D, of, etc., the above named defendant, respectfully represents unto this honorable court, that the complainant, A B, has lately filed his bill in this court, against your petitioner, to obtain a decree dissolving the marriage between him and your petitioner, charging your petitioner with the crime of adultery (*or whatever the charge may be*); that your petitioner has put in her answer to the said bill of complaint denying such charge, as by reference to the said answer, now on file in said cause, will more fully appear.

2. And your petitioner further represents, that she is wholly destitute of the means of supporting herself during the pendency of this suit, and of carrying on the defense, and defraying the costs and expenses attending the same.

3. Your petitioner shows unto the court, that the said complainant is the owner of the following property (*here describe fully the property of complainant, and its value*). Your petitioner also shows that the annual income of said complainant amounts to the sum of — dollars.

Your petitioner, therefore, prays that the complainant may, by an order of this court, be required to pay to your petitioner a reasonable sum for her support and maintenance during the pendency of this suit; and such sum or sums of money as may be necessary to enable her to carry on her defense, to pay solicitor's fees, and to defray the other necessary costs and expenses thereof; and for such other and further relief in the premises as to your honor may seem meet.

C D.

G M B,

Solicitor for petitioner.

STATE OF MICHIGAN, }
County of ——— } ss.

On this — day of —, A. D. 18—, before me personally came the above named C D, and made oath that she has heard read the foregoing petition by her subscribed, and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters which are therein stated to be on her information and belief, and as to those matters she believes it to be true.

I N W,

Notary Public, — County, Michigan.

¹ *Longfellow v. Longfellow*, 1 Clark, N. Y. 344; 2 Barb. Ch. Pr. 268.

In applying for temporary alimony, it is well, in addition to the petition, to procure affidavits from parties acquainted with the pecuniary circumstances of the complainant, and attach them to the petition.

No. 208. Affidavit in support of petition for alimony pendente lite.

STATE OF MICHIGAN.

The Circuit Court for the County of ———. In Chancery.

A B,
Complainant, }
vs.
C D,
Defendant. }

——— County, ss.

S K, of the township of ———, in said county and State, being duly sworn, deposes and says that he is ——— years of age; that he is acquainted with the parties to the above entitled cause, and has known them for ——— years. Deponent further says that * he is acquainted with the pecuniary circumstances of A B, the above named complainant, and (*here set forth the description of the property that the affiant knows that the complainant owns, with the opinion of the affiant as to its value, and all other facts and circumstances of benefit to the petitioner*). And further deponent says not.

S K.

Subscribed and sworn to before me this ——— day of ——— A. D. 18—.

I N W,

Notary Public, ——— County, Mich.

No. 209. Notice of motion for alimony.

(*Title of court and cause.*)

To ———, Solicitor for complainant:

Sir: You will take notice, that upon ———, the ——— day of ———, A. D. 18—, at the opening of court on said day, or as soon thereafter as counsel can be heard, I shall move the court for alimony and expenses in the above entitled cause, in conformity with the prayer of a petition now on file in said cause. You will also take notice, that said motion will be based upon the files and records of said cause, and upon the petition of the defendant, C D, and the affidavit of S K, the annexed being true copies of said petition and affidavit.

Dated at ———, the ——— day of ———, A. D. 18—.

G M B,

Solicitor for defendant and petitioner.

Hearing.—Upon the day and hour upon which the petition is noticed for hearing, the solicitor for the petitioner calls the matter up in court, and reads his petition and the accompanying affidavits, if he has any. When this is done, the solicitor for the other party is entitled to read such counter-affidavits

as he may have, including the affidavit of his client. The matter is then ready for argument. The solicitor for the petitioner is entitled to the opening and closing argument. It is not necessary that copies of the affidavits read in opposition to the application be served upon the solicitor for the petitioner until the petition and accompanying affidavits have been read. The originals of the counter-affidavits must then be filed. The petition and affidavits annexed, must be filed before the notice of the application is served. When there is no appearance in opposition to the petition, the court must be satisfied, by affidavit, that copies of the petition and affidavit, and due and proper notice of the motion were served, or the matter will not be heard.

Questions of guilt not considered.—The question of the guilt or innocence of the wife will not be entered into, in settling the allowance of alimony *pendente lite*, by hearing conflicting affidavits.¹ She must, however, in her petition for alimony, deny the charges contained in the bill, or show some valid defense to the husband's suit, unless she has denied it on oath in her answer.²

The husband may, however, it is said, show that her misconduct was so glaring that no aid should be given to her to prosecute her suit; or, if she had been charged with adultery, that she was still living with the partner of her guilt.³

The amount of allowance.—The amount of the allowance of alimony *pendente lite*, and for expenses, may be settled by the court without a reference, whenever the facts are sufficiently before it.⁴ The whole matter rests in the discretion of the court. The allowance will be limited to the actual wants of the wife, until the result of the suit establishes her right to a more liberal allowance.⁵ The court will take into consideration the nature and means of the husband, the means and condition of the wife, and the claims of children. When the husband is complainant, his poverty is no excuse, and will not

¹ *Wood v. Wood*, 2 Paige Ch. 114; *Osgood v. Osgood*, Id. 621; *Smith v. Smith*, 1 Edw. Ch. 255.

² *Osgood v. Osgood*, 2 Paige Ch. 621; *Wood v. Wood*, Id. 114.

³ *Fowler v. Fowler*, 4 Abbott, N. Y.

412; see *Griffin v. Griffin*, 21 How. N. Y. 304; S. C., 23 How. N. Y. 189.

⁴ *Hammond v. Hammond*, 1 Clarke, N. Y. 151; *Monroy v. Monroy*, 1 Edw. Ch. 382.

⁵ *Haines v. Haines*, 35 Mich. 138.

protect him on an application for alimony. If he can not pay, the court will suspend the suit until the alimony is paid. If monthly or weekly alimony is allowed the wife, it should be only in amount sufficient to satisfy her necessities, and not large enough to make it an object to prolong the suit.

How order is enforced.—The remedy for non-payment of alimony is by attachment for contempt, and not by execution.¹ Non-payment of temporary alimony is contempt of court, and the party can be imprisoned therefor.² But a proper demand and refusal must be shown, and there must have been a reasonable time in which to pay, and a proper hearing why the order is not complied with.³ The regularity of the committal will not be reviewed on *habeas corpus*, if regular on its face.⁴

A resident of this State against whom a divorce has been obtained in another State, may, in a divorce suit here, obtain an award of alimony, and the court may enforce payment thereof by process of contempt, as in other cases.⁵

Pending an appeal from an order committing the defendant in a divorce suit for contempt in refusing to pay alimony, the trial court has sufficient jurisdiction over the parties to make a further order of the same kind, upon the defendant's subsequent refusal to pay alimony that accrued after the appeal was taken.⁶

An order granting temporary alimony being discretionary and not appealable, it will not be considered collaterally on appeal from proceedings for contempt, unless there has plainly been an abuse of discretion.⁷

The proceedings for contempt for non-payment of alimony is the same as in other cases.⁸

No. 210. Order for temporary alimony.

(Caption, etc., as in No. 204.)

And now on this day this cause coming on to be heard upon the petition of the defendant for alimony *pendente lite*, and for an allowance to enable

¹ *North v. North*, 39 Mich. 67;
Palmer v. Palmer, 45 Mich. 150;
How. St. § 7257; *Haines v. Haines*,
35 Mich. 138; *Petrie v. People*, 4 Ill.
234.

² *Steller v. Steller*, 25 Mich. 159.

³ *Brown v. Brown*, 22 Mich. 299.

⁴ *Matter of Bissell*, 40 Mich. 63.

⁵ *Van Inwagen v. Van Inwagen*, 86
Mich. 333.

⁶ *Ross v. Griffitt*, 53 Mich. 5.

⁷ *Haines v. Haines*, 35 Mich. 138.

⁸ *Steller v. Steller*, 25 Mich. 159.

her to defend the same, and the court having read the petition of said defendant and the affidavits in support thereof, and the counter-affidavits of the said complainant, and having heard the arguments of counsel, and being fully advised in the premises, doth order and decree that said complainant, within — days from the date of this order, pay to the solicitor for the defendant — dollars as a retainer in said cause; that he pay to the defendant or her solicitor the further sum of — dollars per month, each and every month in advance, during the pendency of this suit, commencing on the first day of —, A. D. 18—; and that he pay to the defendant or to her solicitor the witness fees of said defendant, and all fees of officers and court expenses, as they accrue and on demand.

A J M,
Circuit Judge.

(Countersigned)
T F G, Register.

A certified copy of the order granting temporary alimony should be served personally upon the husband, and also upon his solicitor, and at the time the money becomes due and payable, a written demand for the money, specifying the amount due, should be served upon the husband.¹

No. 211. Form of demand for temporary alimony.

(Title of court and cause.)

To —, Complainant in the above cause:

Sir: Please pay the bearer, —, the sum of — dollars, the same being the amount of money now due and unpaid upon an order for alimony and expenses, made in the above entitled cause by said court, on the — day of —, A. D. 18—; and you are hereby notified that the bearer has full power and authority from me to demand and receive of and from you the said sum of money, I being the solicitor for said defendant, in the above entitled cause.

Dated, — day of —, A. D. 18—.

_____,
Solicitor for defendant.

Proceedings to compel payment of temporary alimony.— At the time the above paper is served, a verbal demand for the money due should be made by the parties serving the same. Upon the complainant refusing, or contumaciously neglecting to pay the amount due, the solicitor for the defendant should prepare an affidavit, showing the time, place and circumstances surrounding the service of the certified copy

¹ How. St. § 7260; *Edison v. Edison*, 22 Mich. 299; *Steller v. Steller*, 56 Mich. 185; see *Brown v. Steller*, 25 Mich. 159.

of the order for alimony; he should prepare an affidavit showing service of the written demand, and showing the verbal demand for the money; and he should prepare an affidavit showing the amount of alimony due, the fact that it has not been paid, and the refusal or neglect of the complainant to pay the same. These affidavits and a true copy of the written demand referred to in the affidavit of the person serving the same, and a true and certified copy of the order for temporary alimony, may be presented to the court *ex parte*, and it will grant an order for the complainant to show cause why an attachment should not issue to punish him for contempt. The order to show cause should be made returnable within a reasonable time, so as to give the complainant time to prepare his defense.

No. 212. Order to show cause why attachment should not issue.

(Caption, etc., as in No. 204.)

On reading and filing due proof of service of a certified copy of an order made in this cause on the — day of —, A. D. 18—, on the complainant — personally, and on reading and filing due proof of a personal demand of payment of the several amounts of money due and unpaid upon the said order at the time of the service thereof on the said complainant, and that more than — days since the said service of said order and the said demand, have elapsed, and of said defendant's neglect to pay the same, or to cause the same to be paid, or any part thereof, on motion of —, solicitor for defendant, it is ordered that said complainant — appear before this court, and show cause, on the — day of —, A. D. 18—, at the opening of court on that day, why a precept or attachment should not issue against him, and he be punished for his alleged neglect in not paying the several sums of money mentioned in said order of this court, made on said — day of —, A. D. 18—, and his failure to comply with the terms and requirements of said order. And it is further ordered that a certified copy of this order be served upon said complainant personally, on or before the — day of —, A. D. 18—.

(Countersigned)
T F G, Register.

A J M,
Circuit Judge.

In addition to service, as required by the order, of a certified copy of the same, certified copies of the affidavits and papers on file, and upon which the order is based, should be served on the complainant at the same time.

Upon the return day of the order to show cause, the defendant should call the matter up in court, and the complainant

may then read and file his answer to the order, and such other affidavits as he may have to sustain it. The answer of the complainant, to the order, is usually in the form of an affidavit. The defendant should file an affidavit showing due service of the order to show cause. If sufficient cause is not shown by the complainant, the court makes an order that an attachment issue, and that the complainant be let to bail in a sum to be named in the order, for his appearance on the return day of the writ. The return day of the writ should be named in the order allowing the attachment.

No. 213. Attachment for contempt.

IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN.

To the sheriff of the county of Kalamazoo.

Greeting:

We command you that you attach —, so as to have his body before our Circuit Court, for the county of —, in chancery, at the opening of said court, on —, the — day of — A. D. 18—, there to answer unto us the charge of misconduct and contempt, in his neglect and refusal to comply with and obey an order of this court, made and entered on the — day of —, A. D. 18—. in the case of —, complainant, and —, defendant, which he, as alleged, hath committed against us in said cause, then and still pending in said court, and further perform and abide such order as our said court shall make in this behalf. And have you then and there this writ, and make and return a certificate under your hand, of the manner in which you have executed the same.

Witness the Hon. A J M, circuit judge for the county of —, at the — of — the — day of — A. D. 18—.

T F G, Register in Chancery.

_____,
Solicitor for defendant.

No. 214. Return of sheriff to attachment.

STATE OF MICHIGAN, }
County of —. } ss.

I, —, sheriff of the county of —, do hereby certify and return, that by virtue of the within precept, I have taken —, the within named defendant, whom I have let to bail, in pursuance to the order hereon endorsed by the court, in the sum of — dollars, with — as surety, which bond, together with this precept, I hereto attach and return.

Dated this — day of —, A. D. 18—.

_____,
Sheriff.

The bond should run to the sheriff of the county, should recite the issuing and return day of the precept, and should be

conditioned for the appearance of the complainant on said return day.

Upon the return day, the court being satisfied by the return of the officer that the writ has been executed, and the complainant appearing in court, the court makes an order reciting the former proceedings, briefly, and upon motion of the solicitor for the defendant, orders that defendant file forthwith interrogatories specifying the facts and circumstances alleged against the complainant, that a copy be served upon the complainant, and that the complainant put in written answers to such interrogatories on oath and file the same on a day named in the order, on the opening of court on that day.

No. 215. Form of interrogatories in proceedings for contempt.

(Title of court and cause.)

Interrogatories to be exhibited on the part of the defendant, for the examination of —, complainant in this cause, pursuant to an order made in said cause, on the — day of —, A. D. 18—.

First interrogatory: Are you, etc.

Second interrogatory: Did you, etc.

The interrogatories are signed by the solicitor filing them.

No. 216. Answers to interrogatories in proceedings for contempt.

(Title of court and cause.)

Answer of —, the above named complainant, to the interrogatories filed in this court by said defendant, on the — day of —, A. D. 18—.

First: To the first interrogatory, etc.

Second: To the second interrogatory, etc.

Signed,

_____,
Complainant.

STATE OF MICHIGAN, }
____ County, } ss.

— being duly sworn, deposes and says, that he dictated each and every of the foregoing answers to the interrogatories filed against him in said cause; that he so dictated them after the corresponding interrogatory was read to deponent, and that after the several answers were written out, deponent heard each and every one of them read, and knows the contents thereof, and that the same is true of deponent's knowledge and belief, except to the matters which are therein stated to be on information and belief, and as to those matters he believes them to be true.

_____,
Complainant.

Subscribed and sworn to before me, this — day of —, A. D. 18—.

E S R,

Notary Public, — County, Mich.

The complainant may file affidavits in support of, and in confirmation of his answer, and the defendant counter affidavits. The court may adjourn the hearing from time to time as justice may require, making an order to that effect on each adjournment, reciting the previous order, and ordering the bond for appearance to be continued over until the day next appointed for the hearing and argument. After the arguments, the complainant may, by the order of the court, be adjudged in contempt and ordered committed to the county jail for a period named in the order, unless he sooner purge himself of contempt by the payment of the money due, upon which, the order recites, he shall be released from imprisonment.

*No. 217. Order of reference as to alimony pendente lite, and expenses.
(Caption and title of cause as in No. 204, ante.)*

On reading and filing the petition of the defendant in this cause, duly verified, and the affidavits accompanying the same, and the affidavits by the complainant in opposition thereto, and upon hearing the arguments of the counsel for the respective parties, and the court not being sufficiently advised in the premises, doth order that said petition be referred to J M D, one of the circuit court commissioners of said county, to inquire and report what would be a reasonable sum to be allowed to the defendant for her support and maintenance during the pendency of this suit. And it is further ordered, that the said commissioner inquire and report what would be a reasonable sum to be allowed to the defendant, to enable her to carry on her defense in this suit, and to defray the necessary costs and expenses thereof; and that the said commissioner report as to the times and manner in which the said sums should be paid by the complainant.

No. 218. Report of commissioner as to allowance of alimony.

(Title of court and cause.)

To the Circuit Court for the County of ———. In Chancery.

In pursuance of an order of this court, entered on, etc., whereby it was referred to me, the undersigned, a circuit court commissioner of said county, to inquire and report what would be a reasonable sum to be allowed, etc. *(as in the order)*, I, the said commissioner, do report:

That having given due notice to the respective parties of the time and place of the hearing thereof, and having been attended by the solicitors for the complainant and defendant respectively, and having heard the allegations and proofs as to the value of the complainant's *(or defendant's)* estate at the time of the commencement of this suit, and the allowance proper to be made, I certify and report that the complainant *(or defendant)* has real estate, to-wit, etc. *(here describe it)*, of the value of about — dollars, the yearly income of which is about — dollars that the whole

personal property of the complainant (*or defendant*) consists of, etc., and its value is about — dollars; that two children of the complainant and defendant live with and are entirely supported by, etc., one being a boy, aged — years, and the other a girl, aged — years.

I further report that, in my opinion, the sum of — dollars a year, payable monthly, is a suitable allowance for the present separate maintenance and alimony of the defendant (*or complainant*); that it ought to be payable from, etc.; that — dollars would be a reasonable sum to be allowed to the defendant (*or complainant*) to enable her to carry on her defense (*or prosecution*), and defray the necessary costs and expenses in this suit; and that my fees amount to — dollars.

All of which is respectfully submitted.

Dated, etc,

J M D,

Circuit Court Commissioner ———, County, Michigan.

No. 219. Order confirming commissioner's report of alimony, etc.

(Caption and title of cause as in No. 204, ante.)

And now, on this day, comes J M D, a commissioner of this court, and makes report of what would be a reasonable sum to be allowed, etc. (*as in report*), and the court having heard the arguments and allegations of the counsel for the respective parties, in support of and against the confirmation of said report, and having considered the same, and being fully advised in the premises,

It is ordered, that the report of the commissioner aforesaid, be, and the same is in all things, approved and confirmed; and that the complainant (*or defendant*) do pay to the defendant, etc. (*As in the report.*)

No. 220. Short form of decree for alimony, etc., pendente lite, and expenses without reference.

(Caption and title of cause as in No. 204, ante.)

And now, on this day comes the complainant, by L M, her solicitor, and the defendant, by R S, his solicitor, and this cause coming on to be heard upon the application of complainant for alimony, *pendente lite*, and the court having heard the evidence, and the arguments of counsel for the respective parties, and being fully advised in the premises, doth order, adjudge and decree, that the defendant pay to the complainant, or her solicitor, the sum of — dollars, on, etc., and that he pay to the complainant, or her solicitor, the further sum of — dollars, on or before the first day of each and every month, commencing on, etc., for her support during the pendency of this suit.

Permanent alimony.—The power to grant permanent alimony is statutory.¹

Section 6291 of How. Stat., as amended by Act. No. 90 of the Session of 1887, provides that a court in chancery may

¹ *Peltier v. Peltier*, Har. Ch. 19; *Perkins v. Perkins*, 16 Mich. 167.

allot, assign, set apart and decree to a wife, as alimony, the use of such part of her husband's real and personal estate, or such proportions of his earnings, income or revenue, as the court may determine, in its discretion; and also temporary alimony and suit money; provided, that no decree shall be made in favor of the petitioner, unless, on the hearing, either such a state of facts shall appear as would entitle her, as far as the husband's wrongful acts are shown, to a decree for divorce on the grounds specified in the petition, or unless such a state of facts set out in the petition shall be proven as shall make it appear that the respondent has deserted the petitioner with intent to leave her without adequate means of support without good and sufficient cause; and the husband shall be permitted to allege in his answer to the petition, any facts which would prevent or bar a divorce upon the ground alleged in said petition and to make proof of the same in conformity with such answer; and provided further, that an appeal from the final order or decree may be taken to the Supreme Court as in chancery cases, except that if the wife shall take such appeal, she shall not, in the discretion of the court, be required to file an appeal bond.¹

After a decree for alimony, or other allowance for the wife and children, or either of them, the court may, from time to time, on the petition of either of the parties, revise and alter such decree respecting the amount of such alimony or allowance, and the payment thereof, and may make any decree respecting any of the said matters which such court might have made in the original suit.² But such revision can only be made on new facts afterwards transpiring, of such a character as to make the change necessary and proper.³

A decree for alimony vests an absolute right thereto in the wife.⁴

As provided by the statute, the award of alimony may be in gross instead of annual allowances,⁵ and this is favored in

¹ How. St. Sup. § 6293c. See *Reynolds v. Reynolds*, 92 Mich. 104.

² Com. L. 1871, § 4760; How. St. § 6248.

³ *Perkins v. Perkins*, 12 Mich. 456; *Chandler v. Chandler*, 24 Mich. 176.

⁴ *Jordan v. Westerman*, 62 Mich. 170; *Perkins v. Perkins*, 10 Mich. 425; see *Robins v. Robins*, 101 Ill. 417.

⁵ *Hamilton v. Hamilton*, 37 Mich. 603; How. St. § 6245; *Seibly v. Per-*

all cases where the husband would be likely to vexatiously delay the payment.¹ An allowance of a sum in gross, in lieu of alimony, is a bar to all further claims therefor.²

The allowance of alimony for the wife is discretionary with the court, and so also is the allowance for the maintenance of infant children.³ And the Supreme Court will not disturb the decree of the court below on a question of alimony, unless manifest injustice has been done.⁴

Alimony will be granted in proportion to the wants of the party asking it, and the ability of the person who is to pay it. And it may, at any time, be increased or diminished.⁵ It will be allowed in such form as will best meet the condition of the parties and make the provisions a sure reliance. The court may decree the lands of the defendant to the complainant in fee, and may change, after the decree, the allowance in any manner consistent with equitable principles.⁶ When the income of the husband is not sufficient for the support of all dependent upon it, and the parties have been accustomed to rely upon their joint labor for support, the allowance ought not to be so large as to relieve the wife from doing anything for her support.⁷

Upon a decree of divorce, instead of directing that the defendant be perpetually enjoined from selling his property, and that he be imprisoned until he give bond and security for the payment of alimony, the decree should make the alimony a lien upon his realty, to be secured by mortgage; the sale to be enjoined until such mortgage be completed.⁸

Alimony should not be lavishly allowed where the wife is young and healthy, brought no property to her husband, and

son, 105 Mich. 584; *Kirkland v. Kirkland*, 69 N. W. 233; *Adams v. Seibly*, 73 N. W. 372.

¹ *McChung v. McChung*, 40 Mich. 494.

² *Plaster v. Plaster*, 47 Ill. 290.

³ *Bergen v. Bergen*, 22 Ill. 187; *Plaster v. Plaster*, 67 Ill. 93.

⁴ *Stewartson v. Stewartson*, 15 Ill. 145; see *Ross v. Ross*, 78 Ill. 402.

⁵ *Foote v. Foote*, 22 Ill. 425; *Parker v. Parker*, 61 Ill. 369.

⁶ *Wheeler v. Wheeler*, 18 Ill. 39; *Armstrong v. Armstrong*, 35 Ill. 109; *Bergen v. Bergen*, 22 Ill. 189; *Joliff v. Joliff*, 32 Ill. 527; see *Von Glahn v. Von Glahn*, 46 Ill. 134; *Keating v. Keating*, 48 Ill. 241; *Plaster v. Plaster*, 53 Ill. 445; *Wightman v. Wightman*, 45 Ill. 167.

⁷ *Brown v. Brown*, 22 Mich. 242.

⁸ *Erissman v. Erissman*, 25 Ill. 136; *Keating v. Keating*, 48 Ill. 242.

did not aid him in accumulating any, and had obtained a previous divorce for the purpose of marrying him, and lived with him only a short time.¹

A contract made between a wife and her solicitors, in advance of a decree for divorce and allowance of alimony, giving the solicitors one-half of such alimony, is void as against public policy.²

Enforcement.—The statute provides that in all cases where alimony or allowance for the support and education of minor children shall be decreed to the wife, the amount thereof shall constitute a lien upon such of the real and personal estate of the husband, as the court, by its decree, shall direct, and in default of payment of the amount so decreed, the court may order the sale of the property against which such lien is decreed in the same manner and upon like notice as in suits for foreclosure for mortgage liens; or the court may award execution for the collection of the same, or the court may sequester the real and personal estate of the husband and may appoint a receiver thereof, and cause such personal estate and the rents and profits of such real estate to be applied to the payment thereof, or the court in lieu of a money allowance, may decree such a division between the husband and wife of the real and personal estate of the husband or of the husband and wife by joint ownership or right, as he shall deem to be equitable and just.³

The proper practice is for the court to determine in the first instance the right of the complainant to a decree, and to reserve the question of alimony for subsequent adjudication.⁴

The death of the husband pending such adjudication will not oust the court of jurisdiction to award permanent alimony.⁵

The remedy for non-payment of permanent alimony is by execution.⁶ Attachment will not lie.⁷

Where a decree was made, directing a sum allowed for ali-

¹ *Cummings v. Cummings*, 50 Mich. 305.

² *Jordan v. Westerman*, 62 Mich. 170.

³ Public Laws, 1897, p. 251.

⁴ *Seibly v. Person*, 105 Mich. 584.

⁵ Ibid.

⁶ *Taylor v. Gladwin*, 40 Mich. 232; *Palmer v. Palmer*, 45 Mich. 150; see Public Laws 1897, page 251.

⁷ *North v. North*, 39 Mich. 67.

mony to be paid in several future payments, and directing a sale on default, a sale made after all the payments had matured but without any adjudication of the non-payment, and without any further hearing or decree, was held illegal and invalid.¹ An allowance for alimony should be appealed from and not attacked collaterally.² An allowance for temporary alimony is interlocutory, and can not be appealed from.³

No. 221. Decree for permanent alimony.

Caption and title of cause, as in No. 204, ante.)

This cause again coming on to be heard, as to the allowance of alimony to be paid by the defendant to the complainant, upon the bill of complaint herein, the answer thereto, the replication of the complainant to such answer, and the proofs taken in said cause, and the court having heretofore rendered a decree in said cause, dissolving the marriage between the complainant and defendant, and having reserved the consideration of the question of alimony, and the counsel for the respective parties having been heard, and the court having been fully advised in the premises, and on consideration thereof:

It is ordered, adjudged and decreed by the court, that the defendant pay to the complainant the sum of — dollars, during each and every year, commencing on, etc., and payable quarterly in advance, until further ordered by this court; and that the defendant pay the costs of this suit to be taxed by the clerk of this court, within — days from the rendition of this decree; and that in default of the payment of any of said sums, in the manner, and at the times herein provided, that execution issue therefor.

It is further ordered, adjudged and decreed by the court, that this decree shall be and remain a lien upon all the lands and tenements of the defendant, until the defendant shall execute a good and sufficient mortgage upon his real estate, or so much thereof as may be necessary to secure the prompt payment of the sums herein ordered to be paid, and such mortgage be approved by the court, or under its direction.

A J M,
Circuit Judge.

(Countersigned)
T F G, Register.

Re-marriage—When not allowed.—The court granting a decree of divorce may provide, in such decree, that the party against whom any divorce is granted shall not marry again within such time as shall be fixed by the court, which time shall be set out in the decree: *Provided*, that such time shall not exceed the period of two years from the time such decree is

¹ *Perkins v. Perkins*, 16 Mich. 161.

² *Mayhew v. Cooper*, 40 Mich. 528;

³ *Taylor v. Gladwin*, 40 Mich. 232.

Lapham v. Lapham, 40 Mich. 527.

granted. And in case any person shall marry contrary to the time set out in such decree, said party shall be deemed to have committed the crime of bigamy, and shall be subject to the pains and penalties therefor.¹

Abatement—Death of party.—Where no relief is sought not dependent on a divorce, there can be no decree after death has separated the parties.²

Conveyance to defraud wife's right to alimony.—The statute of frauds, which makes void any gift, grant, etc., made with the intent to hinder, delay or defraud "any creditor or other person," applies to transfers of the husband to delay, hinder and defraud his wife in the assertion of her right to alimony or separate maintenance.³

Alimony may be terminated—Re-marriage.—The marriage of a divorced wife is a proper cause for suspending further payment of alimony; and it may be terminated or modified for other causes.⁴

¹ How. St. Sup. § 6263 c.

² *Wilson v. Wilson*, 73 Mich. 620; *Zoellner v. Zoellner*, 46 Mich. 511.

³ *Tylor v. Tylor*, 126 Ill. 525; *Draper v. Draper*, 68 Ill. 17; *Bump on Fraudulent Conveyances*, 515; *Boils v. Boils*, 1 Cold. (Tenn.) 287; *Bouslough v. Bouslough*, 68 Penn. St. 499; *Jenny v. Jenny*, 24 Vt. 324;

Gilson v. Hutchinson, 120 Mass. 27.

Jiggits v. Jiggits, 40 Miss. 718; *Green v. Adams*, 59 Vt. 602.

⁴ *Stillman v. Stillman*, 99 Ill. 196; *Linnahan v. O'Keefe*, 107 Ill. 620; *Danforth v. Danforth*, 105 Ill. 603; *Foss v. Foss*, 100 Ill. 576; *Mussing v. Mussing*, 104 Ill. 127.

CHAPTER XXXIV.

SEPARATE MAINTENANCE.

- Section 1. WHEN GRANTED.
2. PROCEEDINGS TO OBTAIN.
3. DEFENSES TO.
4. PRACTICE IN, AND DECREES.

SECTION I.

WHEN GRANTED.

A divorce from bed and board forever, or for a limited time, may be decreed for the ground of extreme cruelty, whether practiced by using personal violence, or by any other means; or for utter desertion by either of the parties for the term of two years; and a like divorce may be decreed on the complaint of the wife, when the husband, being of sufficient ability to provide a suitable maintenance for her, shall grossly or wantonly and cruelly refuse or neglect so to do.¹

When proper.—A bill for separate maintenance will only be sustained when the reasons are imperative. If, from the evidence, the court is satisfied that the difficulties between the parties are not serious, the bill will be dismissed without prejudice, especially where there are young children for whom they ought to provide a home.²

A large discretion is lodged in the chancellor in such cases; and it is properly exercised in discouraging, rather than encouraging, the permanency of separation between husband and wife, when the cause of such separation appears trivial.³

What must be shown.—To maintain a bill by a wife against her husband for separate maintenance, the former must show,

¹ How. St. § 6229.

³ *Schraeder v. Schraeder*, 26 Ill.

² *Davidson v. Davidson*, 47 Mich. App. Ct. R. 524.
151.

not only that she had good cause for living separate and apart from her husband, but also that such living apart was without fault on her part. If she leave her husband voluntarily, or by consent, or if her misconduct has materially induced the course of action on the part of the husband, upon which she relies as justifying the separation, it is not without her fault, within the meaning of the law. No encouragement can be given to the living apart of husband and wife. The law and the good of society alike forbid it. But a wife, who is not herself in fault, is not bound to live and cohabit with her husband, if his conduct is such as to directly endanger her life, person or health; nor where the husband pursues a persistent, unjustifiable and wrongful course of conduct towards her, which will necessarily and inevitably render her life miserable, and living as his wife unendurable. Incompatibility of disposition, occasional ebullitions of passion, trivial difficulties, or slight moral obliquities, will not justify separation.¹

The party exhibiting the bill or petition, must have resided in the State one year, immediately preceding the filing of the same; the marriage must have been solemnized in this State, and the complainant have resided therein, from the time of such marriage, to the time of exhibiting the bill.

The bill must aver that the acts done, and cause of divorce from bed and board charged, were committed without the privity or procurement of the complainant, and that the bill is not founded on, nor exhibited in consequence of any collusion, agreement or understanding whatever, between the parties, or between the complainant and any other person.²

In the case of a separation sought on the ground of cruel and inhuman treatment, it was held, in New York, that the cruelty which will entitle the party to such a judgment, is that kind of cruelty which endangers the life or health of the complainant, and renders cohabitation unsafe.³ But to constitute cruelty, bodily injury or acts of personal violence are not necessary. It is made out if there is a series of unkind treatment, accompanied by words of menace, creating a rea-

¹ *Johnson v. Johnson*, 125 Ill. 510; *Beller v. Beller*, 50 Mich. 49; *Whitacre v. Whitacre*, 64 Mich. 232; *Sharp v. Sharp*, 116 Ill. 509; *Hunter*

v. Hunter, 7 Ill. (Bradw.) App. Ct. 253.

² How. St. Suppl. § 6232.

³ *Perry v. Perry*, 2 Paige Ch. 501.

sonable apprehension that bodily injury may result unless prevented; and the word "unsafe," in the New York statute, means the same thing.¹ Words of menace, accompanied by a probability of bodily violence, will be sufficient; and it may be enough if he inflict indignity merely, and threaten pain.²

But the causes for apprehension must be weighty, and show an impossibility that the duties of the marriage life can be discharged.³ Thus the husband's refusal to permit his wife to attend church, of which she is a member, is not a ground for separation.⁴ Nor is occasional or even frequent intoxication a ground for separation; nor do occasional sallies of passion, from whatever cause, amount to legal cruelty, so long as they do not threaten bodily harm.⁵ As we have already seen in considering the subject of extreme cruelty and failure to support, upon pages 485 to 489, *ante*, the above is scarcely the law in Michigan. We refer the reader to the chapter upon divorce wherein we have considered these topics.

An allowance will not be made to a wife on account of the cruelty of her husband, if the violence complained of was induced by a sufficient provocation on her part.⁶

As to a proceeding for separate maintenance on the ground of abandonment, it has been held that there must be shown both an abandonment and a neglect to provide.⁷

For any of the grounds of divorce, alluded to in the preceding chapter, a bill for separate maintenance, no doubt, could be maintained. A wife may have sufficient grounds for a full divorce, yet may not desire to proceed to that extremity; in which case she may have a separate maintenance under the provisions of the statute.

¹ *Mason v. Mason*, 1 Edw. Ch. 278, 291; 2 Kent's Com. 126.

² *Whispell v. Whispell*, 4 Barb. 217; Van Santv. Eq. Pr. 262, 263.

³ 2 Kent's Com. 126; *Whispell v. Whispell*, 4 Barb. 217.

⁴ *Lawrence v. Lawrence*, 3 Paige Ch. 267; and see *Burr v. Burr*, 10 Paige Ch. 20.

⁵ *Mason v. Mason*, 1 Edw. Ch. 278.

⁶ *Boyd v. Boyd*, Harper, S. C. Eq. 144; *Griffin v. Griffin*, 8 B. Monr. 120.

⁷ *Ahrenfelt v. Ahrenfelt*, Hoff. Ch. 47; see *Babbitt v. Babbitt*, 69 Ill. 277.

SECTION II.

PROCEEDINGS TO OBTAIN.

Where commenced.—The suit must be commenced in the county where the parties, or one of them, reside.¹

The bill.—The bill for a separate maintenance may be framed substantially as a bill for a divorce, except that the prayer is different. The prayer should be for the care, custody and education of the children, if any, and that the defendant be compelled to make proper and suitable provision for the support and maintenance of the complainant and the children.

Injunction.—If an injunction is deemed necessary to restrain the husband from disposing of, or incumbering his property, or from interfering with the complainant, or the children, during the pendency of the suit, the facts to justify such injunction may be set forth in the bill as in a suit for a divorce.

No. 222. Bill for separate maintenance.

STATE OF MICHIGAN, }
County of ———. } ss.

To the Circuit Court for the County of ———. In Chancery.

1. Your oratrix, A B, of etc., respectfully represents unto this honorable court, that she is a resident of the said county of —; and has resided in said State for more than one year last past; that on, etc., your oratrix was married to one C B, the defendant hereinafter named, at, etc., and continued to live with the defendant C B as his wife ever since said marriage until, etc., when your oratrix was compelled to abandon the defendant C B for the causes hereinafter set forth; that during the time your oratrix and the defendant cohabited as husband and wife, they had two children, namely, E B and F B, the said E B being aged — years, and the said F B — years.

2. Your oratrix further represents, that during the time your oratrix and the defendant cohabited as husband and wife, your oratrix faithfully discharged all her duties as such wife, and at all times treated him with kindness and forbearance; but that the defendant, a few months after said marriage, commenced a course of unkind, cruel and inhuman conduct toward her, which continued until she finally separated from him on, etc.; and that on divers occasions, while she lived with the defendant, he was guilty of such extreme and repeated cruelty toward her as to render it unsafe

¹ How. St. Supp. § 6231.

and improper for her to live with him; that on, etc. (*Specify the particular acts of cruelty.*)

3. Your oratrix further represents, that the defendant is a man of violent passion and ungovernable temper; that on many occasions he addressed to your oratrix the most opprobrious epithets, and threats of personal violence, and has repeatedly threatened to take her life; that in consequence of the cruel and inhuman treatment and threats aforesaid, and such conduct as to render it unsafe for her to live with or remain near him, your oratrix was obliged, on the said — day of, etc., to leave the house of the defendant, and seek refuge with her friends, since which time she has not dared to return to the defendant's house, or live with him.

4. Your oratrix further represents, that the defendant is seized and possessed of real and personal estate of the value of about — dollars; and that his annual income is at least — dollars; and that he is a strong, healthy man, and abundantly able to take care of and support his family; but that he has refused and neglects to provide for the support and maintenance of your oratrix; that your oratrix has no property or income of her own, and is now entirely dependent upon the charity of her friends for support.

5. And your oratrix positively avers that the acts done and charged in this bill of complaint, for which separate maintenance is sought, were committed without the consent, connivance, privity or procurement of your oratrix, and that such bill is not founded on, or exhibited in consequence of any collusion, agreement or understanding whatever, between the parties thereto, or between your oratrix and any other person.

Forasmuch, therefore, as your oratrix is without remedy in the premises; except in a court of equity, your oratrix prays:

I. That the said C B, who is made party defendant to this bill, may be required to make full and direct answer to the same, *but not under oath; the answer under oath being hereby waived;*

II. That the defendant may be compelled to make a proper and suitable provision for the separate maintenance and support of your oratrix and the said children, according to the statute in such case made and provided;

III. That your oratrix may have the care, custody and education of the said children of said marriage;

IV. And that your oratrix may have such other and further relief in the premises as equity may require, and to your honor shall seem meet.

And your oratrix will ever pray, etc.

A B.

N H S,

Solicitor for complainant, and of counsel.

STATE OF MICHIGAN, }
County of ——— } ss.

On this — day of —, A. D. 18—, before me personally appeared the above named —, and made oath that she has heard read the foregoing bill of complaint by her subscribed, and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters which are therein stated to be on her information and belief, and as to those matters she believes it to be true. (*Add clause as to non-collusion as in No. 135 ante, page 471.*)

T R S,

Notary Public, ——— County, Mich.

SECTION III.

DEFENSES TO.

The same defenses that are applicable to a suit for a divorce, apply to proceedings of this nature.¹

Laches.—Eighteen years' delay in suing a husband for support where the wife is living separate and apart from him is fatal to the suit, even if the wife originally left him for cause. Relief will be refused for long delay in cases of matrimonial offenses.²

SECTION IV.

PRACTICE IN, AND DECREES.

The proceedings to a decree are the same as in divorce cases.

An allegation in the bill of cruel treatment, and that the husband has wantonly and cruelly neglected and refused to provide for his wife, being of sufficient ability, has been held to be sufficient, without specifying particular acts.³

After a decree is made from bed and board the court may make such further decree as it shall deem just and proper concerning the care, custody and maintenance of the minor children of the parties, and may determine with which of the parents they or any of them shall remain.⁴

In case of an application for a divorce from bed and board, although a decree for such divorce be not made, the court may make such order or decree for the support and maintenance of the wife and children, or any of them, by the husband, or out of his property, as the nature of the case may render suitable and proper.⁵

When a decree of divorce from bed and board, forever, or

¹ See *ante*, page 500.

² *Reed v. Reed*, 52 Mich. 117; see also *Peipo v. Peipo*, 88 Ill. 438; *Williamson v. Williamson*, 1 Johns. Ch. 488; *Valleau v. Valleau*, 6 Paige Ch. 207; *Fellows v. Fellows*, 8 N. H. 160; *Rawdon v. Rawdon*, 28

Ala. 565; *Stuart v. Stuart*, 47 Mich. 566.

³ *Brown v. Brown*, 22 Mich. 242.

⁴ Comp. L. 1871, § 4748; *How. St.* § 6238.

⁵ *How. St.* § 6262.

for a limited time, shall have been pronounced, it may be revoked at any time thereafter, under such regulations and restrictions as the court may impose, upon the joint application of the parties, and their producing satisfactory evidence of their reconciliation.¹

Reference to commissioner.—The court may order a reference to a commissioner to take proof of the matters alleged in the bill, so far as they are controverted. And it would seem to be the general practice in like cases to direct a commissioner to take proof, and report upon the situation and circumstances in life of the respective parties, to enable the court to make a proper decree in reference to the amount of allowance to be made to the wife. If the facts are sufficiently before the court, no order of reference is necessary.²

No. 223. Report of commissioner as to the evidence and allowance.

(*Title of cause, address, etc., as in No. 187, ante, page 451.*)

In pursuance of an order of this court, in the above entitled cause, dated on, etc., whereby it was referred to me, the undersigned, one of the circuit court commissioners of said county, to take the proof of the respective parties, and report the same to the court; and to inquire and report as to the value of the defendant's estate at the time of the commencement of the said cause, and the situation and circumstances of the respective parties; and what would be a reasonable sum to be allowed to the complainant for her support and maintenance, and the support and maintenance of such of the children of the marriage as reside with her; and also as to the time and manner in which said sums should be paid to the complainant; I, the said commissioner, do report:

That having given notice to the parties respectively of the time and place when and where the testimony would be taken, and having been attended by the solicitors for the complainant and defendant, and having caused to come before me all such witnesses as the respective parties desired or made known to me, I did, on, etc., at, etc., proceed to take the proofs of the respective parties; and the several witnesses attending having been severally sworn, and examined by me, touching the matters aforesaid, I reduced their testimony to writing, and have attached the same hereto, and make the same a part of this report.

I would further report, that in my opinion the complainant is entitled to a decree for separate maintenance, against the defendant, for the causes set forth in her bill of complaint; and that the defendant has real estate of the value of about ——— dollars, the yearly income of which is about ——— dollars; that the whole personal property of the defendant consists of, etc., and its value is about ——— dollars. That two children of the complainant

¹ How. St. § 6263.

151; *Monroy v. Monroy*, 1 Edw. Ch.

² *Hammond v. Hammond*, 1 Clarke, 382.

and defendant live with, and are entirely supported by the complainant, one being a boy aged ——— years, and the other a girl aged ——— years.

I further report, that, in my opinion, the sum of ——— dollars a year, payable monthly, is a suitable allowance for the present separate maintenance of the complainant; that it ought to be payable from the commencement of this suit; that such allowance be made subject to be increased or decreased in the future as circumstances may be shown to require; that my fees herein amount to ——— dollars.

All of which is respectfully submitted.

Dated, etc.

S W O,

Circuit Court Commissioner, ——— County, Michigan.

Amount of allowance.—It is the duty of the commissioner to take proof of the pecuniary circumstances of the husband, and of the condition in life and pecuniary necessities of the wife and any children she may have to support, in order to fix the amount which, in his opinion, is proper to be contributed by the husband for her support weekly, monthly or otherwise.

This amount should be fixed with reference not only to the husband's property and income, but also the claims of his children and others upon him for sustenance and education, and his ability to provide for himself and family by his own exertions.¹

The allowance, pending the suit, is always much smaller in proportion than that which is assigned to the wife as a permanent provision after she has established her right to a separation.²

It is, in general, limited to the actual wants of the wife until the result of the suit in her favor establishes her right to a more liberal allowance, and it will be estimated according to the expense of board and clothing at the place where her relations reside, if she select that as the place of her residence, unless the expense of living there is disproportioned to the property of her husband.³

The poverty of the husband, though no reason for refusing to order an allowance, is to be considered with the circum-

¹ *Lawrence v. Lawrence*, 3 Paige Ch. 267; *Amos v. Amos*, 3 Greene, N. J. Ch. 171; *Turner v. Turner*, 44 Ala. 437.

² *Ib.*; *Morrell v. Morrell*, 2 Barb. S. C. R. 480.

³ *Germond v. Germond*, 4 Paige Ch. 643; *Burr v. Burr*, 10 Paige Ch. 20.

stances in life of the parties, in fixing the amount.¹ Even if he has no property, and depends merely upon his labor for support, he may be compelled to apply a part of his daily earnings to this purpose.²

Where a separation is decreed, and the wife's conduct is blameless, an allowance equal to what the law gives her on the death of her husband is reasonable.³ Thus, in a judgment for separation on the ground of abandonment, a provision that the wife have the use of one-third of his real estate during her life, and the same proportion of his personal estate absolutely, was held to be proper.⁴

In adjudging the amount of allowance, the husband's estate will be presumed to yield a reasonable income, unless the contrary be shown, with a sufficient reason for its unproductiveness; and the reduction of the husband's estate by gifts can not be allowed to diminish the wife's alimony.⁵

Modification of allowance.—The allowance in the final decree is subject to modification from time to time, and leave should be given in the decree to apply for such modification as the changing circumstances of the parties may render just.⁶

No. 224. Decree for a separate maintenance.

(Caption and title of cause, as in No. 204, ante.)

This cause, having come on to be heard upon the bill of complaint herein, the answer of the defendant thereto, the replication of the complainant to such answer, and the proofs taken in this cause, filed herein, and the court having heard the arguments of the counsel for the respective parties, and being fully advised in the premises, doth find that the allegations in the said bill contained are true, as therein stated; and that the equities of this cause are with the complainant.

It is therefore ordered, adjudged and decreed, by the court, that the complainant is entitled to a separate maintenance from the defendant; and

¹ *Hallock v. Hallock*, 4 How. N. Y. 160; *Russell v. Russell*, 75 Mich. 572.

² *Id.*; *Kirby v. Kirby*, 1 Paige Ch. 261; *Prince v. Prince*, 1 Rich. S. C. Ch. 282; see *Bailey v. Bailey*, 21 Gratt. Va. 43.

³ *Thornberry v. Thornberry*, 4 Litt. 252; *Peckford v. Peckford*, 1 Paige Ch. 274; *Burr v. Burr*, 7 Hill Ch. 207.

⁴ *Fishli v. Fishli*, 2 Litt. 337; *Mil-*

ler v. Miller, 6 Johns. Ch. 91; *Burr v. Burr*, 10 Paige Ch. 20.

⁵ *Forrest v. Forrest*, 5 Bosw. 672.

⁶ *Forrest v. Forrest*, 3 Abbott, N. Y. 144; *Lockridge v. Lockridge*, 2 B. Monr. 258; *Rogers v. Vines*, 6 Ired. Eq. 293; *Wheeler v. Wheeler*, 18 Ill. 39; *Waldron v. Waldron*, 5 P. F. Smith, Pa. 281; *Fisher v. Fisher*, 32 Iowa, 20.

that she be allowed, and that the defendant do pay to the complainant the sum of — dollars a year, commencing from the date of the filing of the complainant's bill of complaint herein, to wit, from, etc., and that the said sum be paid in monthly installments of — dollars each, payable in advance, on the — day of each and every month, until the further order of the court; and it is further ordered, adjudged and decreed, that this decree be and remain a lien on the real estate of the defendant, until he shall have given security for its faithful performance, to the satisfaction of the court or to the complainant, and that the defendant pay the costs of this suit; and in case of default in the payment of the said installments of money as the same become due, or the costs herein, that execution issue thereon; and that either party be at liberty to apply to the court as circumstances may require.

CHAPTER XXXV.

SUITS FOR MAINTENANCE.

- Section 1. WHEN PROPER.
2. PRACTICE AND PROCEEDINGS.
3. HEARING AND DECREE.

SECTION I.

WHEN PROPER.

By the common law, a suit for maintenance, without praying divorce from bed and board, or from the bond of marriage, will not lie. The statute, however, provides that whenever a husband shall, without good and sufficient cause, desert his wife, being of sufficient ability to support her, or shall have become an habitual drunkard since their marriage, or practiced extreme cruelty toward her, or committed the crime of adultery, or any other offense that entitles the wife to a decree of divorce or of separation, and shall refuse or neglect to support her, either being a resident of this State, the Circuit Court in chancery of any county in which said husband or wife shall reside, shall, on the application of the wife, decree her as alimony the use of such part of her husband's estate, or such portion of his earnings, etc., as the court may determine in its discretion; *provided*, that no decree shall be made in favor of the wife unless on the hearing either such a state of facts shall appear as would entitle her, as far as the husband's wrongful acts are shown, to a decree for divorce upon the grounds specified in the petition.¹

SECTION II.

PRACTICE AND PROCEEDINGS.

In every proceeding pursuant to the preceding section, the proceedings and practice therein shall be the same, as near as

¹ How. St. Sup. § 6293a.

may be, as is now provided for by law in cases of a petition or bill for divorce and alimony, and the Circuit Court in chancery shall have and exercise the same power and authority therein.¹

The petition.—It is not necessary that the petitioner shall have resided in the State for one year. All that the petition need show with regard to residence is, that the husband is a resident of the State. It would seem necessary to aver non-collusion, as in bills for divorce.

No. 225. Petition for support and maintenance.

STATE OF MICHIGAN, }
County of ———, } ss.

To the Circuit Court for the County of ———. In Chancery.

1. The petition of A B, of the township of ———, county and State aforesaid, respectfully represents unto this honorable court, that on the ——— day of ———, A. D. 18—, your petitioner was married to one C D, defendant herein, and that the said C D is a resident of this State, and resides in the township of ——— county and State aforesaid.

2. Your petitioner further represents, that since her said marriage, she has been to the said defendant a true and faithful wife, and has done all in her power to retain the love, good will and support of the said defendant.

3. Your petitioner further represents that the said defendant, without good and sufficient cause, has deserted your petitioner, and lives separate and apart from her; and though of sufficient ability to support her, the said C D absolutely refuses and neglects to properly provide for and suitably maintain your petitioner, he, the said C D being a resident of this State as aforesaid.

4. Your petitioner further represents to the court, that the defendant is seized and possessed of real and personal estate of about the value of ——— dollars, and that his personal estate consists of (*here set it forth*), and his real estate is known and described as follows, to wit: (*Here insert description.*) Your petitioner shows that the defendant is a strong and healthy man, and abundantly able to take care of and support your petitioner, but he refuses so to do, and your petitioner has no property or income of her own, and is now entirely dependent upon the charity of her friends for support.

5. And your petitioner positively avers that the acts done and charged in this petition, were committed without the consent, connivance, privity or procurement of your petitioner, and that this petition is not founded on, or exhibited in consequence of any collusion, agreement or understanding whatever between the parties hereto or between your petitioner and any other person.

Forasmuch as your petitioner is without remedy in the premises, except in a court of equity, your petitioner prays :

¹ How. St. § 6292.

I. That the said C D, the defendant herein, may be required to make full and direct answer to this petition, *but not under oath, the answer under oath being hereby waived*;

II. That the court may, during the pendency of this proceeding, assign and decree to your petitioner, the possession of the following described real estate, the property of said defendant, to wit (*here describe it*) :

III. That this honorable court may decree a fixed sum for the support of your petitioner, the same to be payable quarterly, and to be secured upon the real estate of said defendant; that during the pendency of this proceeding the defendant shall be required to pay such sums to carry on the same, as the court shall deem necessary;

IV. And that your petitioner shall have such other and further relief as shall be agreeable to equity and good conscience.

(*Add prayer for process, and verification as in divorce bills.*)

SECTION III.

HEARING AND DECREE.

Custody of children.—In all proceedings brought pursuant to this act the court may order and decree concerning the care, custody and maintenance of the minor children of the parties, and may determine with which of the parties the children, or any of them, shall remain.¹

Expenses of proceedings—Alimony pendente lite.—During the pendency of the proceeding, the court may require the husband to pay such sums to carry on the proceeding, or for her support, as it shall deem necessary, in like manner as provided by Section 6235 of Howell's Statutes, being 4745 of the Compiled Laws of 1871, in case of suit for divorce.²

Appeal to Supreme Court.—An appeal from the final order or decree may be taken to the Supreme Court, as in chancery cases, except that if the wife shall take such appeal she shall not, in the discretion of the court, be required to file an appeal bond.³

Order for appearance—Injunction—Execution.—Upon filing of petition a writ of *subpœna* may be issued, served and returned as in ordinary chancery suits; and if it shall be made to appear that the husband has left, or is out of the State, or has concealed himself so that service of process is impossible,

¹How. St. Sec. 6293.

²Public Acts, 1889, No. 243, page 364; How. St. Sup. Sec. 6293 b.

³Ib.

the court may make an order for his appearance, to be published for the same time and in the same manner as the statute provides in chancery proceedings and suits generally; and if it shall be made to appear to the circuit judge that the husband has property, real or personal, credits, stocks or securities, which there is good reason to believe he will dispose of to avoid the decree of the court, the court may grant an injunction, etc.; and notice of such injunction served upon any person who is the agent of the husband or his debtor, or the secretary of any corporation in which he holds stock, etc., shall enjoin them from taking any part in aiding the transfer or incumbrance of such property, and from the payment of such debts, and be notice to any and all persons to whose knowledge it shall be brought, and operate as an attachment on property in the hands of that person, and the court may award execution to enforce its orders or decree to be levied upon the husband's estate found in the State, including stocks, etc.¹

It has been held that Section 6293, How. St., is not expressly repealed by this act, and the exercise of the authority thereby conferred is not inconsistent with that conferred by this act, and that a decree may be entered making the sum awarded a lien on the real estate of the husband.²

¹ *Ib.*

² *Tobey v. Tobey*, 100 Mich. 54.

CHAPTER XXXVI.

BILLS TO QUIET TITLE.

Section 1. WHEN PROPER, AND NATURE OF.

2. FORM OF BILL.

3. FORM OF DECREE.

SECTION I.

WHEN PROPER, AND NATURE OF.

The statutes of Michigan provide that any person claiming the legal or equitable title to lands, whether in possession or not, may institute a suit in chancery against any other person setting up a claim thereto in opposition to the title claimed by the complainant, and if the complainant shall establish his title to such lands, the defendant shall be decreed to release to the complainant all claim thereto, and pay costs, unless the defendant shall, by his answer, disclaim all title to such lands and give a release to the complainant, in which case costs shall be awarded as the court may deem just.¹

Irrespective of the statute, when a party has an equitable cause of action against another, coming within any recognized rule of equity jurisdiction, such as the canceling and delivering up of invalid conveyances, etc., such right can be enforced in equity, whether the complainant is in possession or not.²

Prior to the amendment of the statute in 1887 a party out of possession could not proceed in equity to remove a cloud upon his title.³

¹ How. St. Sup. § 6626.

² *King v. Carpenter*, 37 Mich. 366; *Meth. Church v. Clark*, 41 Mich. 739; *Rowland v. Doty*, Har. Ch. 7; *Whipple v. Farrar*, 3 Mich. 437; *Salisbury v. Miller*, 14 Mich. 160; *King v. Harrington*, 14 Mich. 532; *Orms-*

by v. Barr, 21 Mich. 474; *Ormsby v. Barr*, 22 Mich. 80; *Jones v. Smith*, 22 Mich. 366; *Cleland v. Casgrain*, 92 Mich. 139.

³ *Goodman v. Nester*, 64 Mich. 662; see *Kilgannon v. Jenkinson*, 51 Mich. 241; *Supervisors v. Grand*

The jurisdiction of equity is intended to reach persons out of possession, who can not for that reason be compelled to try their rights at law. It is not intended to reach legal proceedings when they can be had without obstruction.¹ Equity is not the proper tribunal for settling titles to land.²

But a court of equity has jurisdiction to set aside a title procured by fraud;³ or to establish an equitable title of the complainant, where the defendant is in possession under a legal title.⁴

Valid right must be shown.—A bill to quiet the title to lands, will not lie by one in possession, who does not first show some right, legal or equitable.⁵

A bill to remove a cloud from a title will be dismissed if it does not appear that the complainant holds a valid title.⁶ It must show that the complainant is interested in the title; and a suit by or against one who is only indirectly interested can not bind other owners, who can not be represented in his name.⁷

The rule seems to be, in cases of bills to remove clouds upon titles, that where the claim of an adverse party to land is valid upon the face of the instrument, or the proceedings sought to be set aside, and it requires the establishment of extrinsic facts to show the supposed conveyance to be inoperative and void, a court of equity may interfere to set it aside as a cloud upon the real title to the land, and order the same to be delivered up and canceled.⁸

A bill in equity which states only a pretended title in the

Rapids, 61 Mich. 173, and note;
Alger v. Slaght, 64 Mich. 589;
Wykes v. Ringleberg, 49 Mich. 567.

¹ *Barrons v. Robbins*, 22 Mich. 42;
Stockton v. Williams, Walk. Ch.
120; *Stockton v. Williams*, 1 Doug.
546.

² *Blackwood v. Van Vleet*, 11 Mich.
255; *Devaux v. Detroit*, Har. Ch. 98.

³ *Nelson v. Rockwell*, 14 Ill. 375;
Kennedy v. Northup, 15 Ill. 152.

⁴ *Shay v. Norton*, 48 Ill. 105, 106,
and cases there cited.

⁵ *Stark v. Starr*, 6 Wallace, 402;
Hopkins v. Granger, 52 Ill. 504;
West v. Schnebly, 54 Ill. 523; *Hoar*

v. Harris, 11 Ill. 24; *Bowles v. Mc-*
Allen, 16 Ill. 30; *Hutchinson v.*
Howe, 100 Ill. 11; *Oakley v. Hurlbut*,
Ib. 204; *Gage v. Abbott*, 99 Ill. 366.

¹ *Harrison v. Oakman*, 56 Mich.
390.

¹ *Jenness v. Smith*, 58 Mich. 280.

⁸ *Reed v. Tyler*, 56 Ill. 288; *Ham-*
ilton v. Cummings, 1 Johns. Ch.
517; *Pettit v. Shepherd*, 5 Paige
Ch. 493; *Piersall v. Elliott*, 6 Pet.
95; *Ward v. Dewey*, 16 N. Y. 519;
Coulson v. City, 1 Deady, 481; *Fonda*
v. Sage, 48 N. Y. 173; *Mulligan v.*
Baring, 3 Daley, N. Y. 75; *Crooke*
v. Andrews, 40 N. Y. 547.

defendant, and prays for relief against it on the ground of an apprehended injury, can not be maintained.¹ But it need not show that the claim set up by the defendant is one which would be *prima facie* good at law; nor need it set forth the ground upon which the defendant asserts the validity of his title.²

Before a bill will lie, there must be some equity that can not be enforced at law.³ It will not lie to remove a cloud, when the cloud appears to be supported by an equitable right in the defendant.⁴ Fraudulent acquisition of possession by one who has his remedy by ejectment, will not authorize him to file a bill.⁵ If a complainant avers possession of premises, but is not shown to be in actual possession against a defendant shown in possession, nothing appearing to prevent proceedings at law, the bill can not be maintained.⁶

In a suit under the statute to quiet title, a complainant is only bound to make out a presumptively good title, if not rebutted.⁷ If there be no adverse holding, possession of a part of the premises in the right of the entire estate is sufficient.⁸ The bill may include parcels held under the same title contracted to others and in their possession.⁹

The right to bring suit under the statute is not barred by a possession on the part of an adverse claimant obtained by the forcible ouster of the complainant from possession.¹⁰

Where the scope of a bill to quiet title calls for the determination of the question of title between the parties, the defendant may assert his legal title by a cross-bill.¹¹

Cloud upon title defined.—Every instrument purporting by its terms to convey land from the original source of title,

¹ *Torrent v. Booming*, 22 Mich. 354.

² *Holbrook v. Winson*, 23 Mich. 394.

³ *Barrons v. Robbins*, 22 Mich. 35;
Jenkins v. Bacon, 30 Mich. 154;
Blackwood v. Van Vleet, 11 Mich.
252; *Tabor v. Cook*, 15 Mich. 322;
Deer v. Iron Co., 83 Mich. 11.

⁴ *Torrent v. Boom Co.*, 22 Mich. 21.

⁵ *Stetson v. Cook*, 39 Mich. 755.

⁶ *Barrons v. Robbins*, 22 Mich. 35.

⁷ *Hall v. Kellogg*, 16 Mich. 135;
Rayner v. Lee, 20 Mich. 384; *Hans-*

com v. Hinman, 30 Mich. 419; *Hardy v. Powell*, 40 Mich. 413.

⁸ *Fitzhugh v. Barnard*, 12 Mich. 104.

⁹ *Eaton v. Trowbridge*, 38 Mich. 754.

¹⁰ *Bigelow v. Sanford*, 98 Mich. 658; *Harrington v. Scott*, 1 Mich. 17;
Van Anker v. Monroe, 38 Mich. 725.

¹¹ *McKenzie v. Cook*, 71 N. W. Rep. 868; 113 Mich. 452.

however invalid, creates a cloud upon the title, if it requires extrinsic evidence to show its validity.¹

It rests upon a title so long as it is questionable if defendant's title is not *prima facie* better than the complainant's.²

When bill may be maintained.—A bill in equity to quiet title will lie in favor of an occupant of part of a house against one who, having entered another part by the complainant's permission, remains there, claiming title to the whole house under a deed alleged by the complainant to be a forgery.³

Where a grantor in possession asserts that the deed was intended as a mortgage, the grantee may maintain a bill to quiet title, unless the grantor has the legal title and no intervention of equities renders the remedy at law incomplete.⁴

A complainant whose grantors had purchased land of the United States, and who is in actual possession thereof, may come into equity for protection against the claims of a defendant under a subsequent patent from the State, who had never been in actual possession.⁵ A bill to quiet title to an entire estate, will lie even when an action of ejectment is pending against a distinct part of the land, if judgment for the defendant therein would still leave the title in dispute.⁶

A bill to remove a cloud can not be sustained which deduces complainant's title through a judicial sale, where the proceedings which were the basis of such sale, and upon which the validity of complainant's title depends, are shown to be void for jurisdictional defects.⁷

This is the proper remedy to set aside a forged deed, and the like, as a cloud upon the title of the true owner.⁸

Without requiring proof of actual payment, equity will compel the discharge of an outlawed mortgage as a cloud upon title.⁹

¹ *Stoddard v. Prescott*, 58 Mich. 542; *Detroit v. Martin*, 34 Mich. 173; *Pixley v. Higgins*, 15 Cal. 128; *Van Wyck v. Knevals*, 106 U. S. 370; *Whitney v. Port Huron*, 88 Mich. 268.

² *Eaton v. Trowbridge*, 38 Mich. 454.

³ *Sullivan v. Finnegan*, 101 Mass. 447; see *Gould v. Steinburg*, 84 Ill. 170.

⁴ *Shays v. Norton*, 48 Ill. 100.

⁵ *Dale v. Turner*, 34 Mich. 406.

⁶ *Eaton v. Trowbridge*, 38 Mich. 454.

⁷ *Griswold v. Fuller*, 33 Mich. 268.

⁸ *Oliver v. Oliver*, 110 Ill. 119; see *Watson v. Watson*, 118 Ill. 561; S. C., 119 Ill. 532.

⁹ *Kingman v. Sinclair*, 80 Mich. 427.

The holder of the legal title can maintain a bill to remove the cloud caused by the levy of an execution to reach an equitable interest in the land, where there has been a delay of more than a year to ascertain the judgment debtor's equities.¹

If a debtor conveys land in fraud of his creditors to a collusive grantee, and afterward a defrauded creditor reduces his claim to a judgment, and sells the land under execution, the purchaser at such sale can have the fraudulent conveyance set aside as a cloud upon his title.²

Tax title.—Anything in the nature of a tax title that has even a slight tendency to cast doubt upon the owner's title, and to stand in the way of a full and free exercise of his ownership, is a cloud upon his title.³

Possession of a tax title does not necessarily prevent one from relying on an equitable title, and compel him to seek a remedy at law; it is when it appears upon his case in equity that he has such remedy, that a court in chancery should remit him to it. A remedy at law by an action of ejectment is inadequate, when a judgment would still leave complainant's title clouded.⁴

A void conveyance of property to satisfy a special sewer assessment establishes a cloud on title which the owner and occupant of the premises can not compel the municipality to prosecute at law; and he can maintain a bill to clear the title.⁵

A bill filed under How. Stat. Sec. 1168, to quiet title to lands acquired under a tax deed after the repeal of said section by Act No. 11, Laws of 1882, can not be maintained.⁶

If a tax has no semblance of legality, and *prima facie* it is wholly unwarranted by law, or for any reason totally void, so that a person inspecting the record and comparing it with the law, is at once apprised of the illegality, it is not a cloud, for all persons are bound to take notice of such illegality.⁷ Where,

¹ *Edsell v. Nevins*, 80 Mich. 146.

² *Gould v. Steinburg*, 84 Ill. 170; see *Hicks v. Stevens*, 121 Ill. 186; *Rapley v. Bank*, 93 Ill. 396; *Smith v. Dinsmore*, 119 Ill. 656; *Mitchell v. Short*, 113 Ill. 251; see page 394, ante.

³ *Whitney v. Port Huron*, 88 Mich. 268.

⁴ *La Crosse v. Wadsworth*, 56 Mich. 421; see *Gage v. Williams*, 119 Ill. 563.

⁵ *Chaffee v. Detroit*, 53 Mich. 573.

⁶ *Mitts v. McMarran*, 64 Mich. 665.

⁷ *Detroit v. Martin*, 34 Mich. 173.

by the provisions of a charter of a city, a tax is made a lien on the premises assessed, it constitutes a cloud. If illegal a bill will lie to remove it.¹

When not maintainable.—A bill to quiet title is not maintainable where the complainant takes and holds forcible possession for the purpose of filing such a bill and of avoiding a suit at law.²

One who forcibly takes possession of land, can not defeat an action to quiet title brought by the evicted person, on the ground that the latter has an adequate remedy by ejectment.³

One who, upon a speculation, buys a disputed title under an agreement that he is to pay nothing unless he succeeds in getting the land, can not, after he had forced himself into possession during the temporary absence of the person claiming ownership, have the aid of a court of equity to quiet his title and to assist him in his wrongful holding.⁴

A party can not found a possession entitled to recognition by a court of equity upon an entry made by collusion with the servant of the actual occupant; nor can a possession necessary to support a bill to quiet title be predicated upon an entry secured by misrepresentation as to its purpose.⁵

A bill to remove from complainant's title a cloud caused by defendant's claim under a reservation in a deed will not lie where the land is in possession of a party working under an option from defendant, so that a remedy exists at law.⁶

A bill will not lie to remove a cloud from a title, caused by an irregular levy of execution and sale.⁷

Parties.—Unless the State consents to the suit and designates the auditor-general to represent it as a party defendant, a bill can not be maintained against him, as against sales to the State for unpaid taxes.⁸ Persons who can not be affected by the result, having conveyed all interest in the premises, and who set up no further claim, are not proper defendants.⁹

¹ *Scotfield v. Lansing*, 17 Mich. 437;
Thomas v. Gain, 35 Mich. 156; see,
also, *Marquette & Houghton R. R.*
v. Marquette, 35 Mich. 504.

² *Rubert v. Brayton*, 82 Mich. 632.

³ *Bigelow v. Sanford*, 98 Mich. 657.

⁴ *Rubert v. Brayton*, 82 Mich. 632.

⁵ *Wakefield v. Mining Co.*, 85
Mich. 605.

⁶ *Deer Lake Co. v. Michigan Land*
Co., 88 Mich. 11.

⁷ *Rhodes v. Hassler*, 71 N. W. Rep.
461; 113 Mich. 56.

⁸ *Burrell v. Auditor-general*, 46
Mich. 256.

⁹ *Hammontree v. Lott*, 40 Mich.
190.

Defendants to be joined must have a common interest in the titles involved.¹

Necessary allegations of bill.—No formal tender is necessary before filing a bill to remove an invalid tax title; but an allegation of an offer to pay twenty-five dollars for a release, where it greatly exceeds the sum for which the lands were sold, is an averment of an offer to do all that in equity could be required.² When boundary lines are alleged in the bill, they should be clearly and definitely set forth.³ The description should always be clear, definite and accurate.

Allegations of fraud should be specific, and sustained by the proof, though large latitude will be permitted in the introduction of evidence to sustain such averments.⁴

A bill to set aside certain deeds made for property sold for taxes, as a cloud upon the title, which fails to allege any invalidity in the sale or tax deeds, is bad on demurrer.⁵

A bill to remove from the complainant's title a cloud caused by the fraudulent procurement of a deed, is open to criticism, if it does not show whether the charge against the defendant is one of forgery, or of the procurement of a genuine deed by fraud practiced on the grantor.⁶

Laches.—Eleven years unexcused delay in filing a bill to set aside a deed or mortgage is such *laches*, even among near kinsmen, as will defeat the bill, where, in the meanwhile, of necessity, the facts have become obscure, or the proof of them lost.⁷

SECTION II.

FORMS OF BILLS.

No. 226. Bill to quiet title and to cancel deed.

STATE OF MICHIGAN, }
County of ———. } ss.

To the Circuit Court for the County of ———. In Chancery.

1. Your orator, A B, of, etc., respectfully represents unto this honor-

¹ *Hunton v. Platt*, 11 Mich. 264;
Woods v. Monroe, 17 Mich. 238.

² *Hanscom v. Hinman*, 30 Mich. 419.

³ *Howell v. Merrill*, 30 Mich. 282;
Geney v. Maynard, 44 Mich. 578; see
Verpiank v. Hall, 27 Mich. 79.

⁴ *Damouth v. Klock*, 29 Mich. 289;
Fury v. Strohecker, 44 Mich. 337;
Pogodzinski v. Kruger, 44 Mich. 79.

⁵ *Gage v. McLaughlin*, 101 Ill. 155;
see *Gage v. Busse*, 102 Ill. 592; *Bump*
v. Jepson, 106 Mich. 641.

⁶ *Foster v. Hill*, 55 Mich. 540.

⁷ *Haff v. Jenney*, 54 Mich. 511;
Campau v. Van Dyke, 15 Mich. 371;
Compo v. Iron Co., 50 Mich. 578;
Hatch v. Village, 68 Mich. 220.

able court that on, etc., one E F, late of, etc., now deceased, being the owner in fee simple of the following described real estate, to wit : (*Here describe the same*), by his deed of that date, duly executed and acknowledged, conveyed the said described premises to one G H, of, etc., and that afterward, on, etc., the said G H, by his deed of that date, duly executed and acknowledged, conveyed the said premises to B B, late of, etc., but now deceased, the father of your orator.

2. Your orator further represents, that on, etc., the said B B departed this life, intestate, leaving your orator his only heir at law, by means whereof your orator became, and now is, the owner in fee of the said premises.

3. Your orator further represents, that up to and at the time of the conveyance from the said G H to the said B B, the said premises were vacant and unoccupied; that soon after your orator's father purchased said lands, he took possession and commenced improvement of the same, and the said premises are now in a full state of cultivation, with a valuable dwelling-house, barn, and other improvements thereon; and that the same have been in the actual use, occupation and possession of the said B B and your orator, ever since the said purchase by the said B B from the said G H.

4. Your orator further represents, that all the said deeds of conveyance, except the deed from the said E F to the said G H, were duly recorded in the office of the register of deeds of said county soon after the same were executed and delivered; that the said deed of conveyance from the said E F to the said G H, by some accident or oversight on the part of the said G H, was not recorded until, etc.; and that one J K, the defendant herein-after named, who is a speculator in lands and defective titles, discovered by some means, that there was no deed on record from the said E F, deceased, and that there was a link wanting in the chain of your orator's title to said premises, well knowing that your orator was in the possession of the same, claiming title thereto in fee, on, etc., made application to D F and C F, the sons and only heirs at law of the said E F, deceased, as it is claimed, the said E F then having been dead for a long space of time, and, by some means or representations, procured a quit-claim deed of conveyance from the said D F and C F as the heirs at law of the said E F, for the said described premises; and on, etc., filed the same for record in the office of the register of deeds in said county, and by reason of his said deed being first of record, and in order to annoy and vex your orator in the premises, now sets up and claims title to the said lands as against your orator, but refuses to commence a suit at law against your orator to try title to the said premises.

5. Your orator further represents, that the said deed of conveyance of the said D F and C F to the said J K, by reason of the same having been first placed on record in the register's office of said county, is a cloud upon the title of your orator in said premises, and tends to depreciate the value and sale thereof.

Forasmuch, therefore, as your orator is without remedy in the premises, except in a court of equity, your orator prays :

I. That the said J K, who is made party defendant to this bill, may be required to make full and direct answer to the same, *but not under oath, the answer under oath being hereby waived;*

II. That the said deed of conveyance from the said D F and C F to the said J K, bearing date on, etc., as aforesaid, of the said premises, may be set aside and declared void as against your orator, as a cloud upon the title of your orator;

III. That the said deed may be delivered up to be canceled;

IV. And that your orator may have such other and further relief in the premises as equity may require and to this honorable court shall seem meet.

May it please, etc. (*Add prayer for process.*)

No. 227. Bill to set aside a tax deed as a cloud upon title.

(*Venue, and address as in No. 226, ante, page 549.*)

1. Your orator, A B, of etc., respectfully represents that he is the owner in fee simple of the following described real estate, to wit: (*Here describe the premises;*) that he derived title thereto as follows: (*Here set forth the chain of title;*) that ever since your orator purchased the said premises as aforesaid, he has been, and is now, in the actual possession thereof, and has paid all the taxes assessed thereon from time to time as the same became due and payable.

2. Your orator further represents that for the year 18—, there was assessed upon the said premises for the State and county taxes for that year, the sum of — dollars, which said assessment was on, etc., duly paid by your orator to E F, the collector of taxes in and for the township of —, that being the township in which said premises are situated; as will appear by the tax receipt therefor, ready to be produced, a copy of which is hereto attached, marked "Exhibit A," and is made a part of this bill.

3. Your orator further represents that on, etc., one G H, the county treasurer of said county, filed in the county clerk's office of the county aforesaid, a delinquent list, and published notice of application for judgment, in which said delinquent list and notice the said premises were not included; and he did not with the county clerk of said county correct the said delinquent list, and make the affidavit required by law, on the first day of the term of the County Court of said county; that, notwithstanding the defects and omissions of duty as aforesaid, and that the taxes on the said premises had been duly paid by your orator as aforesaid, the said county treasurer sued for, and on, etc., obtained a judgment and precept in the County Court aforesaid against the said premises, and afterwards, on, etc., at a public sale of lands and town lots for the taxes due and remaining unpaid thereon for the year 18—, as aforesaid, sold the said premises to one R S, and issued the usual certificate of purchase therefor; that the said R S afterwards, on, etc., assigned his said certificate of purchase to one O P; that afterwards, on, etc., upon a fraudulent and defective affidavit of the said O P, the clerk of the County Court of said county, executed a deed of conveyance to the said O P; and that the said O P afterwards, on, etc., by his quit-claim deed of that date, conveyed all his right, title and interest in the said premises, to C D, of, etc., the defendant hereinafter named; that the said tax deed to the said O P, and the quit-claim deed from the said O P to the said C D, were filed for record in the recorder's office of the said county of —, on, etc., and duly recorded in book — of deeds, on pages —.

4. Your orator further represents that he had no notice of the said premises having been sold for said taxes, or the execution of the said certificate of purchase, or the making of the said deeds of conveyance, until, etc.; and that as soon as he learned thereof, he called upon the said C D and exhibited to him your orator's tax receipt as aforesaid, showing that said taxes had been paid by your orator, and the said sale had been erroneously made, and demanded of the said C D that he execute a quit-claim deed for said premises to your orator, and thus relieve the title of your orator in the said premises from the cloud cast thereon by the tax sale and deeds as aforesaid, with which reasonable request in that behalf the said C D refused to comply, falsely pretending that the said taxes had not been paid, and that the judgment for taxes, sale and deeds were in every respect regular and valid; and claimed to have a valid title to said premises, but declined to institute a suit at law against your orator to test the validity of his title to said premises.

5. Your orator further represents that the said tax deed to the said O P, and the quit-claim deed from the said O P to the said C D, are clouds upon the title of your orator in the said premises, and tend to depreciate the value thereof, and ought, therefore, to be set aside and declared null and void, and be delivered up to be canceled under the direction of this honorable court.

Forasmuch, therefore, as your orator is without remedy in the premises, except in a court of equity, your orator prays :

I. That the said C D, who is made party defendant to this bill, may be required to make full and direct answer to the same, *but not under oath, the answer under oath being hereby waived*;

II. That the said judgment against the said premises, the proceedings thereon, the tax deed to the said O P, and the deed from the said O P to the defendant as aforesaid, may be set aside and declared void as against your orator, as a cloud upon the title of your orator; and that the said deeds may be decreed to be delivered up to be canceled;

III. And that your orator may have such other and further relief in the premises as equity may require and to your honor may seem meet.

(*Pray process as in No. 226, ante, page 549.*)

No. 228. *Bill to set aside a contract of sale recorded, as a cloud upon title.*¹

(*Venue and address as in No. 226, ante, page 549.*)

1. Your orator, A B, of, etc., respectfully represents unto your honor, that your orator is seized in fee simple of the following described real estate, to wit: (*here insert description*;) that on, etc., one C D, of, etc., one of the defendants hereinafter named, applied to your orator, and represented that he was the agent of the Rock River College Association, and as such was about to purchase lands in the vicinity of the above described premises, and obtained from your orator a proposition for the sale of the said premises, in the words and figures following, to wit:

“CHICAGO, January 22, 1869.

“I will sell to C D, Supt. Rock River College Association, the (*here de-*

¹ *Larmon v. Jordan*, 56 Ill. 204.

scribe the premises) for — dollars per acre, one-fourth cash, balance one, two and three years, with interest at eight per cent. I further agree to wait until May 1, 1869, for first payment, by purchaser giving bond with approved security for payment, with interest at eight per cent, as above.

A B."

2. Your orator further represents that the said C D, at the time of the making of such proposition, requested your orator to give him ten days' refusal upon the terms mentioned therein, which your orator refused to do, but did tell him that if, within the next ten days after that, he received an offer to purchase the said premises, he would advise the said C D of such offer before selling the same.

3. Your orator further represents that your orator saw the said C D almost daily for the next ten days after the making of the said proposition; that the said C D never notified your orator during that time of any acceptance of said proposition, and that afterwards, on the 30th day of January, 1869, your orator and the said C D met and by mutual consent the said proposition was abandoned; that afterwards, on the 1st day of February, 1869, your orator contracted to sell an undivided half of the said premises to one E F; and afterwards, on the 10th day of February, 1869, your orator bound himself to convey five acres of the said premises to Cook county, for the purposes of a Normal school; that on the 8th day of the same month, the Park bill passed one branch of the Legislature, and was expected to pass the other branch, which would greatly enhance the value of said premises; that afterwards, on the 17th day of February, 1869, the said C D applied to your orator and offered to pay him — dollars, and take a contract for the sale of the said premises, which offer your orator declined, and declared the said former proposal abandoned.

4. Your orator further represents that on the 18th day of February, 1869, the said C D, in order to defraud your orator, and to compel your orator to make sale of said premises to him under said proposition, wrote, under the said proposal, the following words, to wit: "The above proposal accepted, and notice given February 18, 1869. C D." And afterwards, on the 26th day of March, 1869, caused the said proposal and acceptance to be recorded in the recorder's office of Cook county, wherein the said premises were situated.

5. Your orator further represents that, afterwards, the said C D assigned the said proposal to one G H, of, etc., another defendant hereinafter named, who now pretends to hold the same as a valid contract with your orator.

6. Your orator further represents that the said proposal, with the said acceptance thereunder written, and recorded as aforesaid, is a cloud upon your orator's title in the said premises, and has the effect to greatly depreciate the value thereof, and to prevent your orator from making sale of the same.

Forasmuch, therefore, as your orator is without remedy in the premises, except in a court of equity, your orator prays:

I. That the said C D and G H, who are made parties defendant to this bill, may be required to make full and direct answer to the same, *but not under oath, the answer under oath being hereby waived;*

II. That the said supposed contract may be declared null and void, and

as a cloud upon the title of your orator may be removed, and be delivered up to be canceled;

III. And that your orator may have such other and further relief in the premises as equity may require, and to your honor shall seem meet.

May it please your honor, etc. (*Pray process as on page 494.*)

SECTION III.

FORM OF DECREE.

No. 229. Decree to quiet title and to cancel deed.

(*Caption and title of cause, as in No. 204, ante.*)

This cause having come on to be heard upon the bill of complaint herein, the answer thereto, the replication of the complainant to such answer, and the proofs taken in said cause, and having been argued by counsel for the respective parties, and the court having duly considered the same, and being fully advised in the premises;

Doth *order, adjudge and decree* that the said deed of conveyance from the said D F and C F to the defendant J K, bearing date on, etc., of the said premises, to wit (*here describe the premises*), and recorded in the recorder's office of the said county of —, be and the same is hereby set aside and declared null and void, as against the complainant, his heirs and assigns, as a cloud upon the title of the complainant; and that the defendant J K do deliver up the said deed to be canceled by the register of this court.

It is further ordered, that the defendant pay the costs of this suit, to be taxed, and that execution issue therefor.

CHAPTER XXXVII.

NE EXEAT.

- Section 1. NATURE OF, AND WHEN PROPER.
2. BILL FOR.
3. HOW OBTAINED, ETC.

SECTION I.

NATURE OF, AND WHEN PROPER.

The writ of *ne exeat republica*, is a process issuing out of a court of record to restrain a person from leaving the State. It was originally applied only to great political objects and purposes of state, for the benefit or safety of the realm. In the time of Richard II, a statute was passed prohibiting all persons whatsoever, excepting lords, great men, merchants and soldiers, from going abroad.¹ It is remarked by Fitzherbert, that, by the common law, every man may go out of the realm at his pleasure, without the king's leave; yet, because every man is bound to defend the king and his realm, therefore the king, at his pleasure, by his writ, may command a man that he go not beyond the sea, or out of the realm without license; and if he do the contrary, he shall be punished for disobeying the king's command.²

In the United States it is only applied to civil purposes, in aid of the administration of justice. It is resorted to for the purpose of obtaining equitable bail;³ and its object and design is to hold a party amenable to justice, and to render him personally responsible for the performance of the orders and

¹ Fleta, 383; Beames on *Ne Exeat*, 179; *Ex parte Bruncker*, 3 P. Wms. 6; *Anon.* 1 Atk. 521; *Flack v.* 312.

Holm, 1 Jac. & Walk. 405, 413, 414.

² Fitzherbert's *Natura Brevium*, 606; *Gresham v. Peterson*, 25 Ark. 85; 2 Story's Eq. Juris. § 1466; 2 Co. 377.

Inst. 54; 3 Co. *Inst. Ch.* 84, pp. 178,

decrees of the court by preventing him from withdrawing himself from its jurisdiction.¹

In some of the States it is granted only in cases of equitable debts and claims;² and refused where the debt is such as that it is demandable in a suit at law.³ Courts of chancery may award the writ of *ne exeat* upon all equitable demands. It is an efficient remedial process in cases of a bill for an account or for alimony.⁴

But in Michigan, a party on failure can only be imprisoned, on proceedings for contempt, for failure to pay alimony.⁵ The power to issue writs of *ne exeat* is not as broad as at common law.⁶

A writ of *ne exeat* will not be granted where it appears from the bill or petition that a complete remedy may be had at law.⁷

A petition for the writ upon the ground that the defendant has sold all his property and is about to depart the State, is defective if it fails to show that the property alleged to have been sold was not exempt from execution.⁸

SECTION II.

BILL FOR.

The bill should set forth the grounds for the issuing of a writ of *ne exeat*, and should pray that the writ issue.

No. 230. Form of prayer to bill for *ne exeat*.

Forasmuch, therefore, as your orator is without remedy in the premises, except in a court of equity, your orator prays:

¹ *Gleason v. Bisby*, 1 Clarke, 551; *Cowdin v. Cram*, 3 Edw. Ch. 231; *Seymour v. Hazard*, 1 Johns. Ch. 1; *Johnson v. Clendenin*, 5 Gill & J. 463; *Hunter v. Nelson*, 5 Blackf. 263; *Gresham v. Peterson*, 25 Ark. 377; see *Samuel v. Wiley*, 50 N. H. 353; *Enos v. Hunter*, 4 Gilm. 211.

² *Palmer v. Van Doren*, 2 Edw. Ch. 425; *Seymour v. Hazard*, 4 Johns. Ch. 1; *Hunter v. Nelson*, 5 Blackf. 263; *Dean v. Smith*, 23 Wis. 483.

³ *Nixon v. Richardson*, 4 Dessau. 103; *Brown v. Haff*, 5 Paige Ch. 235; see *Fisher v. Stone*, 3 Scam. 68.

⁴ *Denton v. Denton*, 1 Johns. Ch. 441; *Dean v. Smith*, 23 Wis. 483; *Hammond v. Hammond*, 1 Clark. 551; *Prather v. Prather*, 4 Dessau. 33.

⁵ *Steller v. Steller*, 25 Mich. 159.

⁶ See Art. VI Const. § 33; Comp. L. 1871, §§ 7174, 7175; How. St. §§ 8750-1; *Badger v. Reed*, 39 Mich. 773.

⁷ *Victor v. Shurtleff*, 81 Ill. 813; see *Bassett v. Bratton*, 86 Ill. 152.

⁸ *Jones v. Kennicott*, 83 Ill. 484; *Malcolm v. Andrews*, 68 Ill. 100.

I. That the said C D, who is made party defendant to this bill, may be required to make full and perfect answer to the same, *but not under oath, the answer under oath being hereby waived;*

II. That the defendant may be stayed by the people's writ of *ne exeat republica* from departing out of the jurisdiction of this court;

III. That your orator may have such other and further relief in the premises as equity may require and to this honorable court shall seem meet.
(*Add prayer for process and verify the bill.*)

SECTION III.

HOW OBTAINED, ETC.

The same officers authorized to allow injunctions may allow *ne exeats*.

No. 231. Allowance by Circuit Court.

Let a writ of *ne exeat* issue in this cause against the defendant C D, as prayed for in the within bill, and that the writ be marked in the sum of — dollars, and that an order to that effect be entered.

Dated, etc.

A J M,
Circuit Judge.

No. 232. Allowance for injunction master.

I certify that I have examined the within bill and am of the opinion that a *ne exeat* should issue in this cause against the defendant C D, and that such writ should be marked in the sum of — dollars.

Dated, etc.

J M D,
Circuit Court Commissioner,
and Injunction Master,
— County, Michigan.

Upon the writ being allowed, an order in conformity with the allowance must be entered by the register. When issued it should be indorsed by the officer allowing it in the sum in which the defendant will be held to bail.¹ The writ is directed to the sheriff and is executed by him. The bond runs to the sheriff. The condition is that the defendant will not depart from the State without leave of the court. If bail is not given, the sheriff retains the defendant in custody, and so makes return. Upon bail being given, and upon special motion based on that fact, the court will discharge the writ.² When once applied for and refused, or granted conditionally, another application can not be made.³

¹ *McNamara v. Dwyer*, 5 Paige, 239.

² See 1 Hoff. Ch. Pr. 167; 1 Barb. Ch. Pr. 654; 1 Hoff. Ch. Pr. 362, 363; *Brayton v. Smith*, 6 Paige, 489.

³ Comp. L. 1871, § 5055; How. St. § 6609.

CHAPTER XXXVIII.

BILLS RELATING TO TRUSTS.

- Section 1. NATURE OF, ETC.
2. FORM OF BILLS.

SECTION I.

NATURE OF, ETC.

Chancery always has jurisdiction to enforce a trust, and for this purpose may appeal to the conscience of the trustee; and although the trust may be established by other evidence, this does not impair the jurisdiction of a court of chancery to enforce the trust.¹

Courts of equity are generally very liberal in protecting mere naked trustees or stakeholders against conflicting claims.²

The jurisdiction of a court of equity for enforcing trusts is not taken away by the fact that a party has a remedy at law, especially when the person seeking relief is entitled to a discovery, or where the trustee is bound to state an account of the trust fund and its proceeds.³

In all cases, in order to invoke the interposition of a court of equity, the trust and the abuse of it must be clearly established in accordance with the rules by which courts are governed in administering justice.⁴

¹*McCredie v. Burton*, 31 Mich. 383; *Barnes v. Brown*, 32 Mich. 146; *Ware v. Linnell*, 29 Mich. 224; *Crissman v. Crissman*, 23 Mich. 217; *Hollister v. Loud*, 2 Mich. 309; *Coates v. Woodworth*, 13 Ill. 654; *Norton v. Hixon*, 25 Ill. 440; see *Doyle v. Murphy*, 22 Ill. 502; see also *Sutton v. Hanford*, 11 Mich. 518.

²*School District v. Weston*, 31 Mich. 85.

³*Howell v. Morris*, 127 Ill. 67; *Pom. Eq. Jur.* §§ 276, 279, 280; *Raynham v. Trustees*, 23 Pick. 148; *Clark v. Henry*, 9 Mo. 336; *Oliver v. University*, 1 Phill. Eq. (N. C.) 69.

⁴*Crissman v. Crissman*, 23 Mich. 217; *Happy v. Morton*, 33 Ill. 398; see *Brunnenmeyer v. Buhre*, 32 Ill. 183; *Marlow v. Marlow*, 77 Ill. 633; *Regan v. West*, 115 Ill. 603.

A court of equity will not lend its aid to establish a trust at the instance of mere volunteers. If the transaction on which a voluntary trust is attempted to be established is still executory or incomplete, the court will decline all interference in the matter.¹

Where an estate is given to trustees, to be disposed of by them at their discretion for the support of a *cestui que trust*, a court of equity will not interfere to control that discretion, unless there has been abuse of the trust.²

While a court of equity will not enforce the acceptance of a trust, it will, when it is voluntarily assumed, enforce a faithful execution of it for the preservation of rights depending upon and derivable from it.³

A trust may be frequently inferred from the facts and circumstances of a particular case; and its creation does not depend upon the use of a particular form of words.⁴

Section 6179, How. Stat., declares that no trust, or power over or concerning lands or in any manner relating thereto, shall be created, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating or declaring the same.

Since such statute was passed, in 1846, no express trust has ever been allowed to be engrafted by parol on a conveyance, but has uniformly been held to be void.⁵

Where one procured an allowance to himself of a claim under a treaty, and received money upon it, he was held to be the trustee of the rightful claimant.⁶ A fraudulent grantee

¹ *Barnum v. Reed*, 136 Ill. 388; *Hill on Trustees*, 83; *Martin v. Funk*, 75 N. Y. 134; *Roth v. Michaelis*, 125 Ill. 325.

² *Smith v. Wildham*, 37 Conn. 384; see *Adams v. Adams*, 79 Ill. 517; *Steele v. Clark*, 77 Ill. 471; *Emmons v. Moore*, 85 Ill. 204; *Att'y Gen. v. College*, 85 Ill. 516; *St. Patrick's v. Daly*, 116 Ill. 76.

³ *Cooper v. McClun*, 16 Ill. 435; see *Nicholl v. Ogden*, 29 Ill. 323; *Dorsey v. Garey*, 30 Md. 489; *Waterman v. Alden*, 144 Ill. 90; *Sherman v. Leman*, 137 Ill. 94.

⁴ *Chadwick v. Chadwick*, 59 Mich. 87; see *Cummings v. Corey*, 58 Mich. 494; *Crissman v. Crissman*, 23 Mich. 217; *Ellis v. Secor*, 31 Mich. 186; *Warner v. Bates*, 98 Mass. 274; *Perry on Trusts*, § 112; *Tyler v. Tyler*, 25 Ill. App. 333.

⁵ *Shafter v. Huntington*, 53 Mich. 315; *Trask v. Green*, 9 Mich. 366; *Newton v. Sly*, 15 Mich. 396; *Brown v. Bronson*, 35 Mich. 415; *Palmer v. Sterling*, 41 Mich. 220; *Bumpus v. Bumpus*, 53 Mich. 346.

⁶ *Edwards v. Hulbert*, Walk. Ch. 54.

can not hold in trust for the rightful claimant.¹ The mere receipt of money by one not entitled to it creates no equity in his favor.²

It was formerly held that a resulting trust existed only when the actual payment of the purchase money was clearly proven and that payment of a part only was not sufficient.³ But resulting trusts in such cases, except in behalf of creditors, have been abolished.⁴

Equitable titles are to be enforced in equity, and a conveyance to the *cestui que trust* will be compelled in proper cases.⁵

Removal of trustee.—Courts of equity have a very broad jurisdiction over trust estates and trustees, and will remove the latter for a failure, through neglect or from willfulness, to perform their duties.⁶

It is not every mistake or neglect of duty or inaccuracy of conduct of trustees which will induce a court of equity to remove them; but the act or omission must be such as to endanger the trust property, or to show a want of honesty, or a want of proper capacity to execute the duties, or want of reasonable fidelity.⁷

Appointment of trustee.—Equity will not allow a trust to fail for want of a trustee, or on account of the neglect or refusal of the trustee to act; but, if necessary, will appoint a new trustee, or treat the holder of the legal title as such.⁸

Where the sole trustee for infants, appointed under a will, dies, and the will does not provide for the appointment of a successor, a court of equity will appoint one.⁹

And where it was shown that the *cestui que trust* was

¹ *Adams v. Bradley*, 12 Mich. 346.

² *Decatur v. Township Board*, 33 Mich. 335.

³ *Bernard v. Bougard's Heirs*, Har. Ch. 130.

⁴ Comp. L. 1871, §§ 2637, 2638; How. St. § 5569-70.

⁵ *Peer v. Kean*, 14 Mich. 354.

⁶ Perry on Trusts, § 275; *Lill v. Neafie*, 31 Ill. 101; see *Att. Gen. v. Garrison*, 11 Mass. 223; *Waterman v. Alden*, 144 Ill. 90; *Sherman v. Le-man*, 127 Ill. 94.

⁷ Story's Eq. Jur. § 1289; *Waterman v. Alden*, 144 Ill. 90.

⁸ *Thatcher v. St. Andrew's Church*, 37 Mich. 270; How. Stat. § 5589; *Ledyard's Appeal*, 51 Mich. 623; *Lill v. Neafie*, 31 Ill. 101; *Hutchinson v. Ayres*, 117 Ill. 558; *Buchanan v. Hart*, 31 Tex. 647; *St. Patrick's, etc., v. Daly*, 116 Mich. 76.

⁹ *Buchanan v. Hart*, 31 Tex. 647; *Hutchinson v. Ayres*, 117 Ill. 558; *Funscomb v. Dunscomb*, 2 Hen. & M. 11; *Guion v. Pickett*, 42 Mich. 77.

prohibited by the laws of the State from coming within its limits, the court substituted for such trustee, a person living in the State where the *cestui que trust* resided.¹

Where a conveyance is made to several, in trust, the failure of one of the co-trustees to act will not defeat the conveyance. In such a case equity will entertain jurisdiction for the purpose of preserving the trust.²

Construction of instrument creating a trust.—It is one of the well recognized functions of courts of equity, whenever there is any *bona fide* doubt as to the true meaning of an instrument creating a trust, to, at the suit of the trustee brought for that purpose, give a judicial construction to the instrument, and direction to the trustee as to his powers and duties thereunder.³

Courts of chancery have power, in cases of necessity, to order a disposition of trust estates which is not in accordance with the provisions of the deed creating the trust. This power will, however, be exercised with great caution; and it is the duty of the court, when unforeseen exigencies arise which make its exercise necessary, to place itself in the position of the creator of the trust, and to do as he would have desired if he had anticipated the existing circumstances.⁴

Giving construction to wills.—The jurisdiction of a court of equity to construe wills is an incident of its general jurisdiction over trusts. And where a testator by his will invokes the equitable jurisdiction of the court in relation to a trust fund, and such fund is reduced to possession by the trustee under the direction of the court, this will also confer, incidentally, jurisdiction to construe the will creating the trust.⁵

Delinquent assignee.—Where the assignee of an insolvent

¹ *Ex parte Tunno*, 1 Bailey Ch. 395; see *Rankin v. Barcroft*, 114 Ill. 441; *Maxwell v. Finnie*, 6 Coldw. (Tenn.) 534.

² *Nicoll v. Miller*, 37 Ill. 388; *McCusker v. Brady*, 1 Barb. Ch. R. 329.

³ *Att'y Gen. v. Haberdasher's Co.*, 1 Ves. Jr. 295; *Shaw's Trust*, L. R. 12 Eq. 124; *Perry on Trusts*, § 746; *Pom. Eq. Jur.* §§ 1064, 1156; *Bailey*

v. Briggs, 56 N. Y. 407; *Attorney-General v. Newberry*, 150 Ill. 229.

⁴ *Curtiss v. Brown*, 29 Ill. 201; *Meyers v. Trustees, etc.*, 21 Ill. App. 223; *Jenkins v. Doolittle*, 69 Ill. 415; see *Leman v. Sherman*, 18 Bradw. 368; 2 *Sugden on Powers*, 506; *Hill on Trustees* (4 Am. Ed.), 298, 302, 190, *et seq.*; *Rankin v. Barcroft*, 114 Ill. 441.

⁵ *Longwith v. Riggs*, 123 Ill. 258.

debtor fails to make any dividend, or to render any account to the creditors of his acts and doings, or make settlement, the creditors may compel a settlement by a bill in chancery.¹

Settlement of estates.—It is only in extraordinary cases that a court of equity assumes jurisdiction in the settlement of an estate, and supersedes the Probate or County Court.² Courts of chancery have jurisdiction generally on the application of beneficiaries of a trust fund, to charge trustees with losses occurring through their negligence or mismanagement, and the fact that trustees are also the executors of a will of the testator who created the trust, will not deprive a court of equity of its jurisdiction, when the bill does not seek to remove any part of the administration of the estate from the County Court.³ The Probate Court has no jurisdiction to order an accounting by a trustee in a will, the chancery court being the proper tribunal for that purpose.⁴

Grantor of trust has no power to change terms.—After a trust has been declared in a deed, the grantor, by express agreement or otherwise, has no power to alter and change the terms or conditions of the trust. The beneficiaries take by the deed a vested interest that is not subject to the control of the grantor nor to any change by the trustee.⁵

Limitations.—In cases of an express trust, the statute of limitations does not apply until the trust is disavowed by the trustee, and an adverse right or interest is insisted upon, and made known to the *cestui que trust*.⁶

The statute of limitations will be applied in equity where they would bar the claim at law.⁷

Bill for accounting against trustee.—In an action for an accounting by a trustee, for the alleged maladministration of the trust, it is not reasonable to require the complainant to

¹ *Asay v. Allen*, 124 Ill. 391.

² *Shepard v. Speer*, 140 Ill. 238; *Duval v. Duval*, 153 Ill. 49; *Cowdrey v. Hitchcock*, 103 Ill. 262; *Freeland v. Dazy*, 25 Ill. 294; *Clark v. Hogle*, 52 Ill. 427.

³ *Waterman v. Alden*, 144 Ill. 90.

⁴ *McBride v. McIntyre*, 91 Mich. 406; *Worden v. Kerr*, 91 Mich. 188;

⁵ *McDonald v. Starkey*, 42 Ill. 442; *Padfield v. Padfield*, 72 Ill. 322.

⁶ *Horne v. Ingraham*, 125 Ill. 198; *Perry on Trusts*, § 634; *Angell on Lim.*, 161, 162; *Kane v. Bloodgood*, 6 Johns. Ch. 110; *Hancock v. Harper*, 86 Ill. 445; *Albretch v. Wolf*, 58 Ill. 186; *Kobogum v. Jackson Iron Co.*, 76 Mich. 498; *Van Buren v. Stocking*, 86 Mich. 246.

⁷ *Hatch v. Village of St. Joseph*, 68 Mich. 220.

set out in his bill the misdoings which he could not be expected to fully understand until he had obtained disclosures, the beneficiary not being generally presumed to possess such knowledge from independent sources. In such a suit, any testimony throwing light on the trustee's management of the trust bears directly on the performance of this duty, and may be considered in taking the account, and in determining the view to be taken of the conduct of the trustee.¹

Where the public is interested in the execution of a trust, the attorney-general is the proper party, either plaintiff or defendant, as the representative of the public.²

Parties to bill.—Where one of two beneficiaries under a trust in their favor in a will refuses to join as a complainant in a bill to enforce the trust, such beneficiary is properly and necessarily made a party defendant.³

In a trustee's suit to reduce the trust fund to his possession, the beneficiaries need not be made parties.⁴

An executor who has settled the estate, and turned over all of the property to the parties interested, is not a necessary party to a bill filed against a trustee named in the will for an accounting.⁵

The personal representatives of a deceased trustee, who received the fund in which complainants are interested and of which they claim to have been defrauded, are necessary parties to a bill for accounting as to such fund.⁶

SECTION II.

FORM OF BILLS.

No. 233. Bill to remove trustees, for injunction and receiver.

STATE OF MICHIGAN, }
County of ———. } ss.

To the Circuit Court for the County of ———. In Chancery.

1. Your orator, A B, and your oratrixes, B B, the wife of A B, and C B, the daughter and only child of A B and B B, all of, etc., respectfully rep-

¹ *Loud v. Winchester*, 64 Mich. 23;
Towle v. Ambs, 123 Ill. 410; see
White v. Cleaver, 75 Mich. 17; *Perrin v. Lepper*, 72 Mich. 454, 458.

² *Perry on Trusts*, § 773; *Jackson v. Phillips*, 14 Allen, 539; *Assn. v. Beckman*, 21 Barb. 365; *Atty. Gen. v. Newberry*, 150 Ill. 236.

³ *Weaver v. Van Akin*, 77 Mich. 588.

⁴ *Snook v. Pearsell*, 95 Mich. 534.

⁵ *McBride v. McIntyre*, 91 Mich. 406.

⁶ *Richardson v. Richardson*, 83 Mich. 653.

resent unto this honorable court, that on, etc., a certain deed of conveyance of that date, was executed between your orator, A B, and your oratrix, B B, his wife, of the one part, and C D and E F of, etc., the defendants hereinafter named, of the other part, which said deed is in the words and figures and to the purport following, that is to say, (*here set out copy of deed verbatim.*) as by the said deed, ready to be produced in court, will appear.

2. Your orator and oratrixes further represent, that the defendant, C D, has principally acted in the trust of the said deed, and has, by virtue thereof, from time to time, received considerable sums of money and other effects, but he has applied a small part thereof upon the trusts of the said deed, and has applied and converted the residue thereof to his own use; and in particular, the said C D has, within a few months past, received a considerable sum of money from the estate and effects of the said D B, the whole of which he has applied to his own use.

3. Your orator and oratrixes further represent, that they have repeatedly applied to the defendants for an account of the said trust property received and possessed by them, and of their application thereof. And your orator and oratrixes well hoped that the defendants would have complied with such reasonable request, as in equity they ought to have done. But now so it is, the defendants combining and confederating, and contriving so to wrong and injure your orator and oratrixes in the premises, absolutely refuse to comply with such requests; and pretend that the trust property and effects possessed and received by them were to an inconsiderable amount and that they have duly applied the same upon the trusts mentioned in said deed. Whereas your orator and oratrixes charge the contrary of such pretenses to be the truth; and that so it would appear if the defendants would set forth, as they ought to do, a full and true account of all and every the said trust property and effects which they have respectively possessed and received, and of their application thereof.

4. Your orator and oratrixes further represent, that the defendant C D, threatens and intends to use other parts of the said trust property, and to apply the same to his own use, and will do so, unless he is restrained therefrom by the injunction of this court; that both said defendants ought to be removed from being trustees under the said deed, and that some other person or persons ought to be appointed by this court, as such trustees in their place and stead; and that in the meantime some proper person ought to be appointed to receive, take charge of, and collect the said trust property.

Forasmuch, therefore, as your orator and oratrixes are without remedy in the premises, except in a court of equity, your orators pray:

I.

That the said C D and E F, who are made parties defendants to this bill, may be required to make full and direct answer to the same, *but not under oath, the answer under oath being hereby waived*; and set forth a true and perfect account, in items of all the trust funds and effects received by them respectively, by virtue of the said deed, and of their application thereof;

II.

That upon the hearing hereof an account may be taken of all and every the said trust property and effects, which have, or but for their willful default or neglect might have been received by them, or either of them, or by any other person or persons, by their or either of their order, or to their or either of their use; and also an account of their application thereof;

III.

That the defendants may respectively be decreed to pay what shall appear to be due from them upon such account; and that the defendants may be removed from being trustees under the said deed;

IV.

That two other persons may be appointed trustees under the said deed in their place and stead;

V.

That in the meantime some proper person may be appointed to receive and collect the said trust estate and effects;

VI.

That your orator and oratrixes may have such other and further relief in the premises as equity may require and to this court shall seem meet. May it please, etc. (*Here insert prayer for injunction and summons and affidavit.*)

No. 234. Bill for the appointment of a new trustee under marriage settlement.

STATE OF MICHIGAN, }
County of ———. } ss.

To the Circuit Court for the County of ———. In Chancery.

1. Your orator, A B, and oratrix, B B, his wife, and your orators, C B and D B, minors, under the age of twenty-one years, by the said A B, their father and next friend, and your orator, E F, all of, etc., respectfully represent unto this honorable court, that on, etc., your orator, A B, and oratrix, B B, then B E, being about to be united in the bonds of matrimony, entered into an ante-nuptial contract or marriage settlement, signed by each, and bearing date on that date, which is in the words and figures and to the purport following, that is to say, (*here insert copy of marriage settlement verbatim.*) as by the said instrument, ready to be produced in court, will appear.

2. Your orators and oratrix further represent, that the said ante-nuptial contract or marriage settlement contains no power or authority to appoint a new trustee in the place or stead of either of the said trustees therein named, who should decline to act in the said trusts, or be desirous to be removed therefrom, as by the said instrument will appear.

3. Your orators and oratrix further represent, that the said intended marriage was soon afterward, to wit, on, etc., had and solemnized between your orator, A B, and oratrix, B B; and that your orators, C B and D B, are

the only children born of such marriage. That the said G H, the defendant hereinafter named, one of the trustees named in the said instrument, as co-trustee of your orator, E F, declines to act in the trust of the said instrument, and is desirous to be relieved and discharged therefrom, but by reason that no power is reserved in the said instrument for the appointment of a new trustee, your orators and oratrix are advised that he can not be discharged from such trust, nor any new trustee appointed in his stead, without the aid of a court of equity.

Forasmuch, therefore, as your orators and oratrix are without remedy in the premises, except in a court of equity, your orators pray :

I.

That the said G H, who is made party defendant to this bill, may be required to make full and direct answer to the same, *but not under oath, the answer under oath being hereby waived;*

II.

That the court may appoint a new trustee under the said marriage settlement, in the place and stead of the defendant;

III.

That the defendant may be decreed to join in such instrument or instruments as may be necessary to convey or release the said trust premises to your orator, E F, his co-trustee, and such new trustee upon the trusts of the said marriage settlement;

IV.

That thereupon the defendant may be discharged from the trusts of the said instrument;

V.

That your orators and oratrix may have such other and further relief in the premises as equity may require and to this honorable court shall seem meet. (*Add prayer for process.*)

CHAPTER XXXIX.

BILLS TO RESTRAIN WASTE.

Section 1. NATURE OF, AND WHEN PROPER.

2. FORM OF BILL.

SECTION I.

NATURE OF, AND WHEN PROPER.

Courts of equity will interfere to restrain waste by persons having limited interests in property, on the mere ground of the common law rights of the parties, and the difficulty of obtaining the immediate preservation of the property from destruction or irreparable injury, by the process of the common law.¹

The statute provides that the Circuit Court for each county shall have equity jurisdiction of all matters concerning waste, in which there is not a plain, adequate and complete remedy at law; and may grant injunctions to stay or prevent waste; and whenever it shall be necessary or proper to have any fact tried by a jury, such court may award a feigned issue for that purpose, as in other cases.²

There are many cases where a person is punishable at law for committing waste, and yet a court of law will enjoin him, as, where there is a tenant for life, remainder for life, remainder in fee, the tenant for life will be enjoined from committing waste.³ So, a landlord may have an injunction to stay waste against an under lessee.⁴ So, an injunction may be obtained against a tenant from year to year, after notice to

¹ 2 Story's Eq. Juris. § 912.

² Comp. L. 1871, § 6369; How. St. § 7956; *Coleman v. Stearns*, 38 Mich. 40; *Wallace v. Harris*, 32 Mich. 391. See, on this subject, How. St., title, Waste.

³ 2 Story's Eq. Juris. § 913; *Powys*

v. Blaggrave, 27 Eng. Law & Eq. R. 568; see *Abraham v. Bubb*, 2 Freem. Ch. 53; *Garth v. Cotton*, 1 Dick. 185, 205, 208; *Eden on Inj.*, Ch. 9, pp. 162, 163; *Davis v. Leo*, 6 Ves. 787.

⁴ *Farrant v. Lovell*, 3 Atk. 723; S. C., *Ambler*, 105.

quit, to restrain him from removing the crops, etc., according to the usual course of husbandry.¹ And an injunction may be obtained against a lessee, to prevent him from making material alterations in a dwelling-house.²

An injunction to restrain waste lies in cases where the aggrieved party has equitable rights only; thus, for instance, in cases of mortgages, if the mortgagor or mortgagee in possession commits waste, or threatens to commit it, an injunction will lie.³

Equitable waste is defined to consist of such acts as are not considered waste at law, being consistent with the legal rights of the party committing them, but which are deemed waste in equity on account of their manifest injury to the inheritance.⁴

The general rule is, that everything is waste which occasions a permanent injury to the inheritance; but it has been said that the situation of this country requires an application of the rule different from that which might be proper in England.⁵

The American rule seems to be that whatever does lasting damage to the freehold or tends to the permanent loss of the owner of the fee or destroys or lessens the value of the inheritance is waste.⁶

A threat to commit waste is sufficient to ground an injunction upon; but the mere apprehension of waste intended is not sufficient where the defendant denies any intention.⁷

Where the title is doubtful or disputed, as between devisee and heir at law, or otherwise, an injunction will not be granted.⁸

A bill in equity is the appropriate remedy for a mortgagee against a mortgagor in possession, who is impairing the security by committing waste.¹⁰

¹ *Pratt v. Brett*, 2 Mad. 62; *Onslow v. —*, 16 Ves. 173.

² *Douglas v. Wiggins*, 1 Johns. Ch. 435; 2 Story's Eq. Juris. § 913.

³ *Farrant v. Lovell*, 3 Atk. 723; *Phoenix v. Clark*, 2 Halst. Ch. 447; *Eden on Inj.*, Ch. 9, pp. 165, 166; *Brady v. Waldron*, 2 Johns. Ch. 148; 2 Story's Eq. Juris. § 710a, 914.

⁴ Story's Eq. Juris. § 915; *High on Inj.* § 432.

⁵ *Keeler v. Eastman*, 11 Vt. 293; *Findlay v. Smith*, 6 Munf. 134.

⁶ Whart. Real. Prop. § 3.

⁷ *London v. Warfield*, 5 J. J. Marsh. 196; *Livingston v. Reynolds*, 26 Wend. 115; *Gibson v. Smith*, 2 Atk. 183.

⁸ 7 Ves. 309; see *Coffin v. Coffin*, Jac. R. 70.

⁹ *Field v. Jackson*, 2 Dick. 599; *Smith v. Collyer*, 8 Ves. 89; *Pilsworth v. Hopton*, 6 Ves. 50a; *Norway v. Rowe*, 16 Ves. 146, 154.

¹⁰ *Cooper v. Davis*, 15 Conn. 556; *Brady v. Waldron*, 2 Johns. Ch. 148;

It is waste to cut and to remove timber from unoccupied lands.¹

The statute, giving a right of action at law for waste, does not deprive the court of chancery of jurisdiction in proceedings to restrain waste.²

Chancery will interpose when the tenant affects the inheritance in an unreasonable and unconscientious manner, even though the lease is granted without impeachment of waste.³

The statute provides that when any person neglects or refuses to pay any tax assessed on land owned by him within the time specified by law, the township treasurer shall be entitled to an injunction to restrain waste on such land, when it shall appear that such land is chiefly valuable for the timber thereon, and that any judge or commissioner may issue the same.⁴

A tenant in dower of coal lands, or a tenant for life, may take coal to any extent from a mine already opened, or sink new shafts into the same vein of coal;⁵ and may make reasonable firewood;⁶ but it has been held, that a tenant for life has no right to take clay or wood from the premises for the manufacture of bricks.⁷

An injunction to stay waste is, as a general rule, prospective, and the court will not, unless under very special circumstances, grant an injunction to prevent the removal of timber already cut;⁸ and, so far as the bill seeks to recover for waste already committed, it can not be sustained.⁹

An executor who has no estate in premises, but who is authorized to lease them, can not maintain an action on the case for waste. Such action must be by a reversioner in fee. The only remedy of the executor for the injury is by action upon the covenants in the lease.¹⁰ As to what constitutes waste by a devisee, see *Seeger's Estate*, 92 Mich. 186.

Salmon v. Clagett, 3 Bland, 125;
Capner v. Mining Co., 2 Green. Ch.
467.

¹ *Benedict v. Torrent*, 83 Mich. 181.

² *Duncombe v. Felt*, 81 Mich. 332.

³ *Ibid.*

⁴ How. St. Sup. § 1170, n. 1; *Rossman v. Adm'rs*, 91 Mich. 69; *Caldwell v. Ward*, 88 Mich. 378; S. C., 83 Mich. 13.

⁵ *Crouch v. Puryear*, 1 Rand, 258;

⁷ *Harris*, 323; 12 Id. 162.

⁶ *Gardiner v. Dering*, 1 Paige Ch. 573.

¹ *Livingston v. Reynolds*, 2 Hill Ch. 157; 26 Wend. 115.

⁸ *Watson v. Hunter*, 5 Johns. Ch. 169.

⁹ *Downing v. Palmater*, 1 Monr. 64

¹⁰ *Page v. Davidson*, 22 Ill. 112.

The reader is referred to 2 Story's Eq. Juris. §§ 909-920; High on Inj. §§ 419-457, for a further investigation of waste.

SECTION II.

FORM OF BILL.

No. 235. Bill by landlord against tenant to restrain waste—injunction, etc.

STATE OF MICHIGAN, }
County of ———. } ss.

To the Circuit Court for the County of ———. In Chancery.

1. Your orator, A B, of, etc., respectfully represents unto this honorable court, that before and at the time of making the lease hereinafter mentioned, your orator was seized in fee simple of the premises hereinafter described; and being so seized by a certain lease, bearing date on, etc., and made by and between your orator of the one part, and C D, of, etc., the defendant hereinafter named, of the other part, your orator demised, leased, and to farm let, unto the defendant, all, etc., (*here describe the premises*), to hold the same, with the appurtenances, unto the defendant, on, etc., for the term of — years, then next ensuing, at the annual rent of — dollars; and the defendant did thereby covenant, promise and agree with your orator that he would, during the said term, keep the said premises in good repair, and manage and cultivate the said farm and lands in a proper, husbandmanlike manner, according to the custom of the country, as by the said indenture of lease, reference being thereunto had, will more fully appear.

2. Your orator further represents that the defendant, under and by virtue of the said indenture, entered upon the said demised premises, with the appurtenances, and became, and was possessed thereof for the said term so to him granted thereof by your orator as aforesaid.

3. And your orator further represents that at the time the defendant entered upon the said premises, the same were in good repair and condition, and your orator hoped the defendant would so have kept the same, and have cultivated the said lands in a proper and husbandmanlike manner, according to the custom of the country, and that such part of the said premises as consisted of meadow or pasture ground would have remained so, and not have been plowed up, and converted into tillage; and that no waste would have been committed on the said premises. But now so it is, the defendant, contriving how to wrong and injure your orator in the premises, pretends that the said premises are in as good repair as when he entered upon the same, and that he has cultivated the said farm and lands in a proper and husbandmanlike manner, and that no waste has been committed by him thereon. Whereas, your orator charges, that the said premises and the buildings, out-houses, gates, stiles, rails and fences, were in a good and perfect state and condition when the defendant entered upon the said premises, but now are very ruinous and bad, and the land very much deteriorated, from the willful mismanagement and improper cultivation thereof by the defendant, who has plowed up certain fields situated, etc., containing respectively — acres, and has otherwise committed great spoil, waste and destruction in, upon and about the said premises.

4. Your orator further represents that the defendant threatens, and is about to plow up the remaining pasture fields on said premises, and to commit other waste upon said lands and appurtenances, which will be an irreparable injury to the same; and that the defendant is so insolvent that any judgment your orator might recover against him in an action at law could not be collected from him.

5. And your orator further charges that the defendant ought to put the said premises in the same condition they were in when he entered thereon, and to make your orator a reasonable compensation for the waste and damage done or occurred thereto; and that the defendant ought to be restrained by the order and injunction of this honorable court, from plowing up the remaining pasture-fields upon said premises, which he threatens to do, and also restrained from committing any further or other waste, spoil or destruction, in and about or to the said estate and premises, or any part thereof.

Forasmuch, therefore, as your orator is without remedy in the premises except in a court of equity, your orator prays :

I.

That the said C D, who is made party defendant to this bill, may be required to make full and direct answer to the same; *but not under oath, the answer under oath being hereby waived;*

II.

That upon the final hearing hereof, the defendant may be decreed to put the said premises into such repair and condition, in every respect, as far as circumstances will permit, as the same were in at the time he entered upon the same under said lease as aforesaid; and to make a reasonable compensation to your orator for all wastes done, committed or suffered by him on the said premises, and all damages occasioned thereto by his mismanagement or neglect;

III.

That he may be decreed to keep the said premises in good and sufficient repair and condition during the remainder of his time therein, and to manage and cultivate said farm and lands in a proper and husbandmanlike manner, according to the custom of the country;

IV.

That he may be restrained by the order and injunction of the court from plowing up the said remaining pasture fields forming part of said demised premises, and from committing or permitting any further waste or spoil in, on or to the said premises, or any part thereof;

V.

And that your orator may have such other and further relief in the premises as equity may require and to this honorable court shall seem meet.

May it please, etc. (*Conclude with a prayer for process and injunction and affidavit.*)

CHAPTER XL.

SUBROGATION.

Nature of.—Subrogation is the substitution of one creditor to the rights and securities of another, and gives to the substitute all the rights of the party for whom he is substituted. It is treated as the creature of equity, and is so administered as to secure real and essential justice without regard to form; and is independent of any contract relations between the parties to be affected by it; and is broad enough to include every instance in which one party pays a debt for which another is primarily answerable, and which in equity and in good conscience should have been discharged by the latter.

In what cases it applies.—The doctrine of subrogation is confined to the relation of principal and surety, and guarantors; to cases where a person, to protect his own junior lien, is compelled to remove one which is superior; and to cases of insurers paying losses. In the first class of these cases, the doctrine is applied to prevent a multiplicity of suits. And in the second class of cases the person discharging the superior lien is treated as its purchaser or assignee, unless the facts show it was intended as an absolute payment. In case of insurers, the law proceeds to subrogate the insurer who has paid the loss, upon the ground that where he has done so, he is entitled to the thing insured, as being abandoned by the assured, including every means or remedy for its recovery, or for recovering compensation for its loss by those who held the insurance, whose rights pass to and vest in the insurer, by implication of law, even where no act is done to transfer the right.

This seems to be the only character of cases in which the doctrine is applied. And while cases are innumerable that may arise under these heads of subrogation, the jurisdiction

of courts in the application of this doctrine is clearly limited and defined.¹

The right of subrogation arises by operation of law and not by contract,² but it may, like other rights, legal or equitable, be qualified or extinguished by contract.³

It is a doctrine of equity and has no application to an action at law,⁴ and it will not be enforced at the expense of a legal right.⁵

The doctrines of subrogation and of equitable lien are to prevent fraud, and do justice, and should never be applied where subrogation would work injustice,⁶ or the establishment of an equitable lien would not carry out the intent of the parties. Payment of incumbrances under an explicit verbal agreement that the incumbered property shall be conveyed to the person paying them, may be ground for subrogating him to the rights of the incumbrancers to the extent of the payments, but subject to such rights as may have arisen meanwhile.⁷

Suretyship or guaranty.—A surety, or one standing in that situation, who is compelled to pay the debt of the principal, will, in equity, be entitled to be subrogated to all the rights and equities of the creditor as to any fund, security, lien or equity which the creditor may have against any other person or property on account of the debt. The equities of the surety extend to all the rights of the creditor respecting the debt which the surety pays.⁸ And the right of a surety to be subrogated to the rights of the creditor is by no means a new doctrine. It has been often held that it is the right of

¹ *Bishop v. O'Conner*, 69 Ill. 431.

² *Hays v. Ward*, 4 Johns. Ch. 123; *Parks v. Cadwallader*, 53 Ill. App. 236; *Hughes v. Ins. Co.*, 17 Ill. App. 518; *Loeb v. Fleming*, 15 Ill. App. 503; *Locke v. Duncan*, 53 Ill. App. 373.

³ *Hughes v. Hartford I. Co.*, 17 Ill. App. 518.

⁴ *Meyer v. Mintonye*, 106 Ill. 414.

⁵ *Simpson v. McPhail*, 17 Ill. App. 499; *Schmitt v. Heneberry*, 48 Ill. App. 322; *Junker v. Rush*, 136 Ill. 179; *Bank v. Potius*, 10 Watts. 148; *Rittenhouse v. Levering*, 6 W. & S. 190.

⁶ *Dwight v. Scranton*, 82 Mich. 624.

⁷ *Kelly v. Kelly*, 54 Mich. 30, 47; *Bush v. Wadsworth*, 60 Mich. 255, note.

⁸ *Eddy v. Trevor*, 6 Paige 521; *Lochenmeyer v. Fogarty*, 112 Ill. 572; *Powell v. Allen*, 11 Bradw. 129; *Campbell v. Goodall*, 8 Bradw. 266; *Parks v. Cadwallader*, 53 Ill. App. 236; *Dooley v. Lackey*, 55 Ill. App. 30; *Telford v. Garrels*, 132 Ill. 550; *Robinson v. Roos*, 138 Ill. 550; *Rasch v. Bissell*, 106 Mich. 106.

the surety when he pays the debt of his principal, to be subrogated to whatever security the creditor had.¹ But usually a surety is bound with his principal by the same instrument, executed at the same time, and upon the same consideration.² If the obligation of the surety is not coeval with the original debt or the execution of the security therefor, and he pays such debt, he will not, as against intervening liens acquired after contracting the original debt, and before the payment by the surety, be entitled to the benefit of the lien of such security.³

To give the creditor the right to be substituted in the place of the surety of his debtor, the relation of debtor and creditor must exist between the creditor and the surety. The claim on the surety must be valid, binding and capable of being enforced immediately against him. If the relation of creditor and debtor has never existed between them, or having existed, has been terminated by release or payment or in any other mode, there can be no substitution. When the surety is liable for the immediate payment of the debt, he may pay it, and resort to the fund he holds, as an indemnity, to reimburse the money he has legally paid for his principal. He is not required to wait until the money is collected by an action, nor will chancery even require it to be paid, if the creditor applies to be substituted to the surety's right to resort to the fund pledged for his indemnity, but will require the fund to be appropriated directly to the payment of the debt. But unless the surety has the immediate right to pay the debt and resort to the indemnity, he has no right to which the creditor can be subrogated.⁴

¹ *Eddy v. Trevor*, 6 Paige 521; *City v. Love*, 31 Iowa, 119; *Hayes v. Ward*, 4 Johns. Ch. 123; *Richeson v. Crawford*, 94 Ill. 165; *Rice v. Rice*, 108 Ill. 199; *City of Keokuk v. Love*, 31 Iowa, 119; 1 Leading Cases in Equity, 144; 1 Story's Eq. Jur., sections 337, 499, 502; Brandt on Suretyship and Guaranty, sections 260, 275; *Wise v. Shepherd*, 13 Ill. 41; *Billings v. Sprague*, 49 Ill. 509; *Hough v. Aetna Life Ins. Co.*, 57 Ill. 318; *Fogarty v. Ream*, 100 Ill. 366; *Darst v. Bates*,

95 Ill. 493; *Dunphy v. Gorman*, 29 Ill. App. 132; *Junker v. Rush*, 136 Ill. 179; *Hawkins v. Harding*, 37 Ill. App. 564.

² Brandt on Suretyship and Guaranty, Secs. 1, 268; *Patterson v. Pope*, 5 Dana (Ky.), 241; *Bank v. Shirley*, 12 Bush. 304.

³ *Powell v. Allen*, 11 Bradw. 129; Brandt on Suretyship, etc., section 362.

⁴ *Constant v. Matteson*, 22 Ill. 556.

It is well settled that a surety can not be subrogated to the rights of his principal, unless he has paid the entire debt.¹

The courts have sometimes recognized what is known as a conventional subrogation, resulting from an express agreement with the creditor to the effect that the security held by him shall be assigned to the person paying, or kept on foot for his benefit.²

A surety does not, by payment, become *ipso facto* subrogated to the rights of the creditor, but only acquires a right to such subrogation, and before a substitution or equitable assignment can actually take place, he must actively assert his equitable right thereto.³

As between the principal and surety, subrogation takes place when the surety pays the debt, and this rule is necessary to avoid a multiplicity of suits.⁴

Where the sureties of a county collector are compelled to pay money to the State or county for the default of the collector after he has transferred his real estate after the statutory lien has attached thereto, they will, in equity, be entitled to be subrogated to the lien in favor of the State, and may enforce the same against the grantee of the collector by a bill in chancery to reimburse themselves for the amount paid by them.⁵

Junior incumbrancers or purchasers.—A person occupying the position of a junior mortgagee, or his assignee, may discharge an incumbrance which is a prior lien, and thereby be subrogated to any and all securities held by or for the benefit of the holder of a prior lien.⁶

¹ 1 Lead. Cases Eq. 152; Sheldon on Sub. § 127; Brandt on Suretyship, § 266; *Loeb v. Fleming*, 15 Ill. App. 503.

² *Loeb v. Fleming*, 15 Ill. App. 503; *Sanford v. McLean*, 3 Paige, 122; *Receivers v. Wortendyke*, 27 N. J. Eq. 660; *Brice's Appeal*, 95 Pa. St. 145.

³ *Junker v. Rusk*, 136 Ill. 179; *Rittenhouse v. Levering*, 6 W. & S. 190; *Bank v. Patins*, 10 Watts, 148.

⁴ *Bishop v. O'Connor*, 69 Ill. 437; *Conwell v. McCowan*, 81 Ill. 287;

Jaques v. Fackney, 64 Ill. 87; *Floyd v. Goodman*, 8 Yerg. 484; *Herok v. Kimball*, 2 Blackf. 309; *Dunphy v. Gorman*, 29 Ill. App. 132.

⁵ *Richeson v. Crawford*, 94 Ill. 165; *Hunter v. United States*, 5 Peters, 173; *U. S. v. Hunter*, 5 Wash. C. C. R. 446; *Hook v. Richeson*, 115 Ill. 431; *S. C.*, 106 Ill. 392; *Crawford v. Richeson*, 101 Ill. 351.

⁶ *Darst v. Bates*, 95 Ill. 493; *Land Co. v. Peck*, 112 Ill. 408; *Bressler v. Martin*, 133 Ill. 288; *Ebert v. Gerding*, 116 Ill. 219; *Magill v.*

Who may be subrogated.—An execution creditor, on the payment of a chattel mortgage, subject to which his levy is made, may be subrogated to the rights of the mortgagee, and demand an assignment of the mortgage.¹

A mortgagee, purchasing mortgaged premises on a foreclosure at law, subject to a note not then due, takes the premises charged with such unmatured debt; it being conclusively presumed that the land sold for that much less than it would otherwise have brought. In such a case the mortgagee can not collect the note of the mortgagor by a suit at law, and if allowed to do so the mortgagor would be entitled to be subrogated to the rights of the mortgagee under his mortgage, in order to subject the land to the payment of such note.²

A mortgagee, on foreclosure in equity, may have the benefit in that suit of the obligation of a grantee of the mortgagor, who has assumed and covenanted in his deed to pay the mortgage debt as a part of the purchase price of the mortgaged premises.³

When one of two partners pays a mortgage on the partnership property, which it was the duty of his copartner to discharge, on condition that it shall stand as security for such payment, an equity arises in his favor entitling him to indemnity through the mortgage by subrogation.⁴

Where a widow, after the death of her husband, pays off a debt secured by a deed of trust given by the husband, and takes a release of the trust deed, the deed being a valid lien, and thereby preserves the property, she will have the right to foreclose the same for her own benefit.⁵

Where a creditor of a mortgagor of chattels is compelled, by an order of court in which he has filed a bill, to bring into court the amount secured by the mortgage, and the mortgagee, by leave of court, withdraws the same, even though

D. Co. Bk., 126 Ill. 249; *Stiger v. Bent*, 111 Ill. 328; *Smith v. Dinsmoor*, 119 Ill. 656; *McCormick v. Bauer*, 122 Ill. 573.

¹ *Lucking v. Wesson*, 25 Mich. 443.

² *Shermer v. Merrill*, 33 Mich. 284; *Wallace v. McBride*, 70 Mich. 596.

³ *Hicks v. McGarry*, 38 Mich. 668, and cases cited in the opinion. See

also *Taylor v. Whitmore*, 35 Mich. 99; *Manwaring v. Powell*, 40 Mich. 374; *Winans v. Wilkie*, 41 Mich. 266; *Booth v. Ins. Co.*, 43 Mich. 299; *Unger v. Smith*, 44 Mich. 24; *Gage v. Jenkinson*, 58 Mich. 172.

⁴ *Laylin v. Knox*, 41 Mich. 40.

⁵ *Stinson v. Anderson*, 96 Ill. 373.

such order was erroneously made, the creditor will be entitled, in equity, to be subrogated to the rights of the mortgagee under the mortgage.¹

Where a mortgage is foreclosed for an instalment only, it remains in force as to notes secured by subsequent instalments; and indorsers of such notes may look to the security for indemnity, if called on to pay them. If the mortgagee bids in the premises on foreclosure sale for an instalment due, and afterwards gives a warranty deed for the land, the warranty deed discharges the mortgage, and releases the indorsers of such notes as may be secured by subsequent instalments thereof.²

A party who is compelled to pay a claim for the heirs of a deceased person, who, on repaying it, will be entitled to indemnity from the estate, will be subrogated to the latter's rights, and may file his claim directly against the estate.³

A person loaning money in good faith to an administrator for the purpose of paying the debts of the estate, and receiving as security a mortgage executed under color of authority from the Probate Court, but which was held invalid, will be subrogated to the rights of the holders of a mortgage on land belonging to the estate which was paid from said loan.⁴

Where a bill of lading of goods was sent to a bank with a draft for the amount due, payable on delivery, and the vendee obtained possession to examine the property, but failed to pay the draft or return the property, and the bank paid the draft, it was held that the bank was subrogated, and could maintain replevin.⁵

The assignee of a second mortgage may hold the assignment as security for the money paid by him to redeem from the first or prior mortgage.⁶

One who seeks to obtain the discharge of a mortgage lien or an assignment of the mortgage or subrogation to the mortgagee's rights, must tender not only the amount due on the

¹ *Magill v. Bank*, 126 Ill. 244.

² *Bridgman v. Johnson*, 44 Mich. 491; *McCurdy v. Clark*, 27 Mich.

445; *Miles v. Skinner*, 42 Mich. 181.

³ *Campau v. Miller*, 46 Mich. 148.

⁴ *Ins. Co. v. Aspinall*, 48 Mich. 238;

and see *Lockwood v. Bassett*, 49 Mich. 550.

⁵ *Bank v. Howard*, 52 Mich. 423.

⁶ *Wendell v. Highstone*, 52 Mich. 553.

mortgage, but the necessary expenses incurred in taking steps to enforce the security.¹

The assignee of an insolvent debtor, on payment of a debt secured by a mortgage on land conveyed to him prior to the assignment free from said incumbrance, can not take an assignment of the mortgage and enforce it against the grantee, such payment having extinguished the mortgage.²

Where there are two judgments against a party for the same debt, the last one being upon an appeal bond given by him on an appeal from the first judgment, his sureties on the appeal bond, on paying the last judgment, will be subrogated to the rights of the holder under the first judgment; and in such case, notwithstanding the satisfaction of the second judgment, the first one will continue in force for the benefit of the sureties.³

A lien holder who discharges a lien of the State for taxes is entitled to be subrogated to the rights of the State.⁴

Where a person loaning money, taking a deed of trust as security, applies a portion of the money so loaned in the discharge of a prior incumbrance on the premises embraced in his deed of trust, for the purpose of making his security a first lien, he will, in equity, be subrogated to the rights of the prior lien holder in respect to his security, although there be a formal release of the prior incumbrance, and the transaction will be treated as an assignment of such prior lien or incumbrance so as to cut off an intervening lien of a judgment recovered against the grantor in the trust deed after the execution and recording of such deed, but before the money loaned was actually paid over, so far as concerns the lien of the prior incumbrance.⁵

Where an insurance company has paid the amount of a loss, and the insured afterwards recovers against a railroad company the amount of his loss for setting fire to his building, the insurance company is entitled to receive, to the extent of the

¹ *Shutes v. Woodard*, 57 Mich. 213;
Myres v. Yapple, 60 Mich. 339.

² *Byles v. Kellogg*, 67 Mich. 318.

³ *Burgett v. Paxter*, 99 Ill. 288;
Freeman on Judgments, 468; *Stiles*

v. Eastman, 1 Kelly, 205; *Poe v. Darrah*, 20 Ala. 288.

⁴ *Pratt v. Pratt*, 96 Ill. 184; *Sharp v. Thompson*, 100 Ill. 447.

⁵ *Tyrrell v. Ward*, 102 Ill. 29;
Young v. Morgan, 89 Ill. 200.

insurance, any excess beyond the loss of the insured that may be recovered by him of the railroad.¹

If a partner is compelled to pay a debt to save the property from sale under a power in a mortgage, he will have a clear right of subrogation to the mortgage lien.²

If one of two mortgagors, after conveying his interest in the mortgaged premises to the other, the latter assuming to pay the mortgaged debt, is compelled to pay the debt, or any part of it, he may be subrogated to the rights of the mortgagee or his assignee.³

Where a third person for a present consideration guarantees the payment of an existing debt, and the debtor executes to him a mortgage conditioned for the payment of the indebtedness to the creditor and the indemnification of the guarantor, the creditor by substitution is entitled to the benefit of the security.⁴

A surety who pays a judgment recovered by creditors in a suit against an administrator on his official bond, he having invested the trust funds in a homestead, is entitled to be subrogated to the rights and remedies of such creditors against the administrator, and the estate in his hands, including said homestead, on which a lien should be decreed in his favor for the amount in the administrator's hands at date of decree for distribution, with interest thereon, not exceeding the amount paid by the surety, subject to all *bona fide* incumbrances placed thereon prior to the filing of his bill.⁵

Who can not be subrogated.—A mere stranger or volunteer can not, by paying a debt for another, be subrogated to the rights of the creditor in respect to the security given by the real debtor.⁶

It is only when the payment of incumbrances is necessary to protect the rights of the payer, or when they are paid pursuant to an agreement with the debtor that the payer shall hold

¹ *H. Ins. Co. v. Pennell*, 2 Ill. App. Ct. (Bradw.) 609.

² *McMillan v. James*, 105 Ill. 194; see *Conwell v. McCowan*, 81 Ill. 285; *C. Bank v. Dudgeon*, 65 Ill. 11.

³ *Shinn v. Shinn*, 91 Ill. 477.

⁴ *Butterworth v. Kretzler*, 72 N. W. 99; 115 Mich. 1.

⁵ *Pierce v. Holzer*, 65 Mich. 263.

⁶ *Hough v. Ins. Co.*, 57 Ill. 318; *Young v. Morgan*, 89 Ill. 199; *Beaver v. Slanker*, 94 Ill. 175; *White v. Cannon*, 125 Ill. 412.

them as security for the money advanced, that the payer will be subrogated to the right of the holder of such liens, and the liens kept alive for his benefit.¹

It does not extend in favor of a fraudulent purchaser.²

A purchaser at a partition sale, whose title becomes worthless, has no right to subrogation.³ So, a purchaser of an equity of redemption has no right to be subrogated to the right of the mortgagee, on payment of the mortgage debt.⁴

A court of equity will not subrogate a volunteer to the rights of a mortgagee under a mortgage paid by him.⁵

A guardian on satisfying his ward's claim for money wrongfully invested in real estate, can not be subrogated to the latter's equities and enforce the trust arising in favor of the ward, for his own benefit; nor can his heirs do so, on satisfying such a claim against his estate.⁶

The mere expectation of an inheritance can not constitute any such consideration for the payment of incumbrances thereon; nor can the fear of having this expectation disappointed by the possible advent of other heirs be made a ground for subrogation to the liens discharged.⁷

Limitations.—The equitable right of a surety paying a judgment against his principal and himself, and co-sureties to be subrogated to the creditor's judgment, and to enforce the same for his benefit, will be barred by the statute of limitations, where his remedy at law on the implied contract of indemnity is barred.⁸

Parties.—On a bill by a surety to be subrogated to a creditor's lien the co-sureties are necessary parties.⁹

No. 236. Bill by surety to be subrogated to rights of mortgagee.

(Venue and address as in No. 235, ante, page 570.)

1. Your orator, A B, of, etc., respectfully represents that on, etc., one C

¹ *White v. Cannon*, 125 Ill. 412;
Candle v. Murphy, 89 Ill. 352.

² *Devine v. Harkness*, 117 Ill. 145.

³ *Bassett v. Lockard*, 60 Ill. 164;
Lagger v. Ass'n, 146 Ill. 283; *Borders v. Hodges*, 154 Ill. 498.

⁴ *Cox v. Garst*, 105 Ill. 342.

⁵ *Smith v. Austin*, 9 Mich. 465;
DeSot v. Ross, 95 Mich. 81; *Bush v. Wadsworth*, 60 Mich. 255.

⁶ *Rowley v. Towsley*, 53 Mich. 329.

⁷ *Kelly v. Kelly*, 54 Mich. 31, 49.

⁸ *Marker v. Rush*, 136 Ill. 179;
Simpson v. McPhail, 17 Ill. App. 499; *Johnson v. Belden*, 49 Iowa, 301; *Joyce v. Joyce*, 1 Bush. 474; 1 Lead. Cases in Eq. 154; Brandt on Suretyship, § 267; Sheldon on Subrogation, § 110.

⁹ *Hook v. Richeson*, 115 Ill. 431.

D, of, etc., being indebted to one E F in the sum of — dollars, for so much money, by the said E F then loaned to the said C D, the said C D and your orator, as his security, made and delivered to the said E F a promissory note of that date, and thereby promised to pay to the said E F the said sum of money in *one year* after the date thereof, with interest thereon at the rate of *six* per cent. per annum, which said promissory note was signed by the said C D as principal thereto, and by your orator as security for the said C D, and without any consideration moving from the said C D or E F to your orator.

2. Your orator further represents, that to further secure payment of the principal sum and interest above mentioned, the said C D and D D, his wife, on, etc., by their mortgage deed of that date, conveyed to the said E F in fee simple, the following described real estate situated in the said county of, etc., to wit: (*Here describe the premises.*) Subject, however, to a condition of defeasance upon the payment of the said principal sum and interest aforesaid, according to the tenor and effect of the said promissory note, which said deed was on, etc., duly acknowledged, and afterwards, on, etc., filed for record in the recorder's office of the said county of, etc., and duly recorded in Book No. 1 of Mortgages, at page —, as by the said mortgage deed, and its accompanying certificate of acknowledgment and recording, ready to be produced in court, and by a copy thereof hereto attached, marked "Exhibit A," and made a part of this bill, will more fully appear.

3. Your orator further represents, that soon after the execution and delivery of the said promissory note and mortgage deed, and before the said note became due, the said C D became wholly insolvent and unable to pay the amount due on the said promissory note.

4. Your orator further represents, that after the maturity of the said promissory note, on, etc., the said E F, the holder thereof, demanded of your orator, as security, as aforesaid, the amount due on said note, and your orator was compelled to and did pay to the said E F, the full amount due thereon, to wit, the sum of — dollars; which said payment was indorsed upon said note by the said E F, as will more fully appear from the said promissory note, now held by your orator, and the indorsement thereon, ready to be produced upon the hearing of this cause; a copy of the same is hereto attached, marked "Exhibit B," and made a part of this bill of complaint.

5. Your orator further represents, that by reason of the insolvency of the said C D, he is in danger of losing the amount so paid by your orator as security as aforesaid, and that in justice and in equity your orator is entitled to be subrogated to all the security, including said mortgage lien, held by the said E F.

6. Your orator further represents, upon information and belief, that one G H and J K, of, etc., have or claim some interest in the mortgaged property aforesaid, as purchasers, judgment creditors, or otherwise, the precise nature of which is unknown to your orator, but such interests, if any there be, have accrued since, and are subject to the rights of your orator, under the mortgage aforesaid.

Forasmuch, therefore, as your orator is without remedy in the premises, except in a court of equity, your orator prays:

I.

That the said C D, D D, E F, G H and J K, who are made parties defendant to this bill, may be required to make full and direct answer to the same, *but not under oath, the answer under oath being hereby waived;*

II.

That upon the hearing hereof, the court will decree that your orator be subrogated to all the rights and benefits of the said mortgage lien possessed by the said E F;

III.

That an account may be taken in this behalf by or under the direction of the court, of the amount due your orator, as aforesaid;

IV.

That the defendant, C D, may be decreed to pay your orator whatever sum shall appear to be due to him upon the taking of the said account together with costs of this proceeding, by a short day to be fixed by the court;

V.

That in default of such payment, the said premises may be sold, as the court shall direct, to satisfy the amount due your orator, and the costs;

VI.

That in case of such sale, and a failure to redeem therefrom pursuant to law, the defendants, and all persons claiming through or under them, after the commencement of this proceeding, may be forever barred and foreclosed of all right or equity of redemption of the said mortgaged premises;

VII.

And that your orator may have such other or further relief in the premises as equity may require and to the court shall seem meet.

(Pray process as in No. 157 ante, page 353.)

L M, Solicitor for complainant.

(Add Exhibits.)

CHAPTER XLI.

MARSHALING ASSETS.

Nature of the remedy.—The marshaling of assets is such an arrangement of the different funds under administration as shall enable all the parties having equities therein to receive their due proportions, notwithstanding any intervening interests, liens, or other claims of particular persons to prior satisfaction out of a portion of these funds.¹

The principle upon which the court proceeds is, that a creditor having his choice of two funds ought to exercise his right of election in such a manner as not to injure other creditors, who can resort to only one of these funds. But if, contrary to equity, he should so exercise his legal rights as to exhaust the fund to which alone other creditors can resort, then those other creditors will be placed by a court of equity in his situation, so far as he has applied their fund to the satisfaction of his claim. This principle is well settled in the jurisprudence of this country, as well as in that of England;² and it is not confined to the case of creditors, but is also applied to other persons standing in a similar predicament.³

The doctrine will not, however, be applied where it would work injustice to the creditor, or other party in interest, having a title to the double fund, or where it would operate unjustly to the common debtor.⁴ Nor is it applied in favor of persons who are common creditors of the same common debtor, except upon some special equity.⁵ It applies, however, during

¹ 1 Story's Eq. Jur. § 558.

² *Alston v. Mumford*, 1 Block. 266; *Goss v. Lester*, 1 Wis. 43; *Kendall v. New Eng. Co.*, 13 Conn. 394; *Piatt v. St. Clair*, 6 Ham. (Ohio) 233; *Russell v. Howard*, 2 McClean (U. S. C. C.), 489; *Everston v. Booth*, 19 Johns. 486.

³ *Dorr v. Shaw*, 4 Johns. Ch. R. 17; *Cheeseborough v. Milliard*, Ib.

412; *Oppenheim v. Walker*, 3 Hun (N. Y.) 30; S. C., 5 N. Y. 325.

⁴ *Brown v. Cozard*, 68 Ill. 178; *Averell v. Loucks*, 6 Barb. 407; *Sweet v. Rodhead*, 76 Ill. 374; *Palmer v. Snell*, 111 Ill. 161.

⁵ *Wise v. Shephard*, 13 Ill. 41; *Ex parte Kendall*, 17 Ves. 514, 520; *Lloyd v. Galbraith*, 32 Penn. St. 103; *Everston v. Booth*, 19 Johns. R. 486.

the lifetime of the debtor, as well as in the administration of his estate after his death;' though it has been said that courts of equity have no right to marshal the assets of a person who is living.²

It is a familiar principle, which has frequently been acted upon in Michigan, that where one has two separate funds, and another a subsequent lien upon one of them, the former will be first compelled to exhaust the subject of his exclusive lien, and will be permitted to resort to the other only for the deficiency. It should, however, appear that the mortgagee will not be prejudiced by the enforcement of this rule.³

The object of the rule is not to take from the former incumbrancer any substantial right, but to require him to enforce his rights in such order of priority as, without loss to himself, will protect, as far as practicable, the subsequently acquired interests of others.⁴

The creditor has a right to come into court in the first instance and look to either one or both of the funds or property covered by his securities for the satisfaction of his debt. By making subsequent purchasers or incumbrancers parties, he thereby gives them an opportunity to come into court and make such a case as will show they are entitled to this protection. It is not sufficient that it appears a double security has been given, and that there is a junior incumbrance on a part of the property. It should further be made to appear that no injury will result from an enforcement of the rule—that the former creditor's rights will not thereby be impaired.⁵

In the case of *Wise v. Shepherd*, 13 Ill. 41, TRUMBULL, Justice, states the doctrine thus:

"It is a familiar principle that, where there are two creditors of one debtor, the first having two funds to which he may resort for the satisfaction of his debt, and the second only being able to reach one of the funds, the first shall resort for

¹ *Hawley v. Mancius*, 7 Johns. Ch. R. 174, 184; *Dorr v. Shaw*, 4 Johns. Ch. R. 17; 2 Leading Cases in Eq. 71; 1 Waite's Ac. & Def. 352.

² See *Lacam v. Mertius*, 1 Ves. § 313; see *Colbert v. Daniel*, 32 Ala. 329.

³ *Bank v. Truesdale*, 38 Mich. 430; *Cooper v. Bigley*, 13 Mich. 463.

⁴ *Sibley v. Baker*, 23 Mich. 312.

⁵ *Brinkerhoff v. Marvin*, 5 Johns. Ch. 320; *Post v. Markall*, 3 Bland. 486; *Aldrich v. Cooper*, note 2; *White and Tudor's Eq. Cases*, 232 et seq.; *Bank v. Truesdale*, *supra*.

satisfaction of his debt to that fund which he alone can reach, and thus leave to the junior creditor the only means he has for obtaining payment of his demand. This course is equitable as to all parties, and does injustice to none.¹

“But this principle, as shown by the cases of *Ex parte Kendall* and of *Wood v. Shaw*, has never been extended to a case where one of two creditors has a lien for his debt upon two funds belonging to two separate debtors, and the other has a lien only upon the fund belonging to one, so as to compel the first to make his debt wholly out of that debtor whom the other creditor can not reach, unless the relation between the debtors be such as to make it equitable that the debtor, having but the one creditor, should pay the whole demand against him and his co-debtor, and thus leave the property of his co-debtor free to be taken in satisfaction of the claim against him alone.”²

The rule that where one party has two funds to resort to for the satisfaction of his demand, he must resort to that upon which another person has no claim, is enforced only in equity, and has no application in a proceeding at law.³

It is upon the principle of marshaling assets, as applied to the administration of estates, the satisfaction of mortgages and other liens, that by a bill in equity, a party may compel another to resort to a particular fund for the payment of that other's debt when there are two or more funds to which he might otherwise resort.⁴

The principle is, that where two or more funds exist, and there are several claims against them, and, at law, one of the parties may resort to either fund for satisfaction, but the other can resort to but one, courts of equity exercise the authority of marshaling the funds, and by this means compel the party having the right to look to both funds, to resort to that upon which the other party has no claim, and thus enable the party

¹ *Lanoy v. Duke of Athol*, 2 Atk. 446; *Everston v. Booth*, 19 Johns. 492; *Hayes v. Ward*, 4 Johns Ch. 132.

² See *Eberhardt's Appeal*, 8 Watts & Serg. 327; *Reynolds v. Tooker*, 18 Wend. 59; *Neff v. Miller*, 8 Barr. 347.

³ *Hunter v. Whitfield*, 89 Ill. 229; *Land Co. v. Peck*, 112 Ill. 408.

⁴ *Hurd v. Eaton*, 28 Ill. 122; *Prout v. Lomer*, 79 Ill. 331; *Rogers v. Meyers*, 68 Ill. 92; *Brown v. Cozard*, Id. 178.

who has but one remedy to receive satisfaction. This rule, however, as has been said, is never applied except where it can be done without injustice to the creditor or other parties interested, or the common debtor.¹

Marshaling assets of partnership.—The equitable rule which requires the assets of a partnership to be first applied to the payment of the firm debts, and *vice versa*, is founded, not upon the equities of the creditors, but upon the equities as between the partners. Each partner has the equitable right to have partnership assets applied, in the first instance, to the satisfaction of partnership debts, so that his individual property may be relieved; and so the members of the firm have each an equitable right to have the individual property of each partner first exhausted in satisfying his individual debts, in order to the exemption of the joint estate, as far as possible, from seizure for individual debts.²

But firm creditors, whose debts have not been reduced to judgment, have no specific lien, either legal or equitable, upon the property of either the firm or the individual partners, and their right to have the firm assets so marshaled as to satisfy their debts first, can only be worked out through the equities of the partners.³

Inverse order of alienation.—The rule in relation to the marshaling of assets has been fully recognized and applied, by requiring the sale of mortgaged premises in the inverse order of alienation.⁴

¹ *Hurd v. Eaton and Hunter v. Whitfield*, *supra*; see *Hards v. Burton*, 79 Ill. 504.

² *Ex parte Ruffin*, 6 Ves. 119; *Huiskamp v. Wagon Co.*, 121 U. S. 311; *Fitzpatrick v. Flanagan*, 106 U. S. 648; *Case v. Beauregard*, 99 U. S. 119; *Waterman v. Hunt*, 2 R. I. 298; *Shackleford v. Shackleford*, 32 Gratt. 481; *Coakley v. Weil*, 47 Md. 277; *Hanford v. Prouty*, 133 Ill. 339.

³ *Hanford v. Prouty*, 133 Ill. 339; *Farwell v. Huston*, 151 Ill. 239; *Farwell v. Cook*, 42 Ill. App. 291; *Dilworth v. Curtis*, 139 Ill. 508.

⁴ *Clower v. Dickenson*, 5 Johns. Ch. 240; *Lyman v. Lyman*, 32 Vt. 79; *Shannon v. Marsells*, 1 Saxton, 413; *Hinkle v. Alslott*, 4 Gratt. 284; *Allin v. Clark*, 17 Pick. 47; *Chase v. Woodbury*, 6 Cūsh. 143; *Bank v. Bank*, 11 Ohio, 444. See *Green v. Ramage*, 18 Ohio, 428; *Parkman v. Weld*, 19 Pick. 241. *Contra*, *Dickey v. Thompson*, 8 B. Mon. 312; *Bates v. Reddick*, 2 Clarke, 423; *Matteson v. Thomas*, 41 Ill. 110; *Iglehart v. Crane*, 42 Ill. 261; *Baird v. Jackson*, 98 Ill. 78; *Warner v. De Witt Nat. Bank*, 4 Bradw. 305; *Palmer v. Snell*, 111 Ill. 161.

The equitable rule of marshaling securities, whereby lands mortgaged are required to be sold in the inverse order of alienation, rests upon the reason that when the mortgagor sells a part of the mortgaged premises without reference to the incumbrance, purporting to convey the fee simple, and retaining a part himself, it is equitable, as between the mortgagor and his grantee, that the part still held by the mortgagor shall be first subjected to the payment of the debt; and this equity having attached to the land, a subsequent purchaser from the mortgagor, with notice, takes it subject to the same equity.¹

In order to obtain the benefit of the rule requiring the sale to be made in the inverse order of alienation as applicable to the foreclosure of a mortgage on real estate, which, subsequent to the execution of the mortgage, has been sold in separate tracts to different purchasers at different times, such purchasers must be made defendants, and must show, (1) the mortgagee actually knew what the order of alienation was, and (2) that such mortgagor requested the mortgagee to sell in that order, or that with such actual knowledge, his duty was to sell the property.²

This rule is never applied to the injury of an innocent mortgagee. Before he can be required to shape his action in reference to the subsequent order of alienation, he must have actual notice of what the order was, and not merely the constructive notice derived from the registry of deeds made by the mortgagee subsequent to the mortgage. He is under no obligation to search the record.³

The rule of marshaling assets must be so applied as to protect and not destroy equities. Thus, where one of two tenants in common has paid his share of a joint mortgage, and the other has mortgaged his portion a second time, the former is entitled to a discharge, and the latter mortgagee can not have the first mortgage satisfied from the joint property or postponed to his own on the ground that the release is in fraud of his rights.⁴

¹ *Briscoe v. Powers*, 47 Ill. 448; *Boone v. Clark*, 129 Ill. 466; *Allen v. Jackson*, 122 Ill. 567.

² *Dates v. Winstanley*, 53 Ill. App. 623.

³ *Matteson v. Thomas*, 41 Ill. 118; *Dates v. Winstanley*, 53 Ill. App. 623.

⁴ *Southworth v. Parker*, 41 Mich. 198; *Slater v. Breese*, 36 Mich. 77.

The rule in equity that on the foreclosure of a mortgage on lands, a portion of which has been subsequently mortgaged, the portion not so doubly incumbered shall be first sold, does not apply where the premises covered by the first mortgage, in which the wife joined, include the mortgagor's homestead, the junior mortgage not being signed by her.¹

The first grantee of a portion of mortgaged premises has a right to understand that all the rest stands charged with the payment of the mortgage debt before his portion can be resorted to. Equity will relieve when a party has so enforced his legal rights as to work injustice to another.

Thus, where a foreclosure sale was so managed that advantage was taken of the absence of one who had a lien on a portion of the land, and who had no notice of the proceedings, and the remainder of the land, though it would have abundantly satisfied the whole debt, was bid in at nominal prices, and the portion on which he had a lien was bid in at its full value, in order to cut off his equities it was held equity would relieve, and that the sale should be re-opened on petition of the incumbrancer, upon his compliance with proper terms, as by giving security that on a resale he would bid for the parcels first charged with the satisfaction of the demand, a sum equal to its amount, and repay to the foreclosure purchaser all sums spent by him in improving the land since its purchase, less reasonable rent for that time.²

A mortgagee's right to a prompt foreclosure of his mortgage will not be impeded or delayed by first compelling him to resort to a personal remedy he may have against a purchaser of a portion of the mortgaged premises from the mortgagor, who assumed payment of the mortgage debt. The most that the subsequent purchaser of the remaining portion of the land can ask, is to have the mortgaged premises sold in the inverse order of alienation.³

When mortgaged lands embrace separate parcels, upon one

¹ *Armitage v. Toll*, 64 Mich. 412; see *Smith v. Rumsey*, 33 Mich. 192; *Bank v. Elliott*, 53 Mich. 256; *Searl v. Chapman*, 121 Mass. 19; *Chapman v. Lester*, 12 Kans. 592; 2 Jones on Mort. § 1632.

² *Gilbert v. Haire*, 43 Mich. 288; *Bullard v. Green*, 10 Mich. 268; *McKinney v. Miller*, 19 Mich. 142; *James v. Brown*, 11 Mich. 25.

³ *Palmer v. Snell*, 111 Ill. 161; *Meacham v. Steele*, 93 Ill. 135; *Baird v. Jackson*, 98 Ill. 78.

of which is a dwelling house, that parcel should be sold last, and only in case the others do not sell for enough to satisfy the decree.¹

The mortgagor of a lot mortgaged as one parcel may so sell on statutory foreclosure, although part of the lot has been conveyed by the mortgagor to a grantee assuming the mortgage and the rest to some one else. The latter, if he wishes his part sold last, should file a bill in equity before the sale.²

In case of successive mortgages, or a mortgage and a subsequent sale on execution, or otherwise, of a portion of the mortgaged premises, the subsequent mortgagee or purchaser may insist that the portion of the estate retained by the mortgagor shall first be subject to the mortgage debt, and that the interest of subsequent mortgagees or purchasers shall be liable therefor in the inverse order of alienation.³

So, when a part of the mortgagor's equity of redemption has passed from him by sale under execution, the mortgagee's right of foreclosure will be limited to such amount as may equitably be enforced against such parcel, though such mortgagor may be liable for a larger sum.⁴

To enable a junior mortgagee, subsequent purchaser or judgment creditor to insist, as against the original mortgagee, that the effect of releases of portions of the mortgaged premises by the latter is a discharge, *pro tanto*, of the original mortgage debt, it is not necessary for him to file a cross-bill in a suit to foreclose the original mortgage, as he may obtain such relief upon answer.⁵

¹ *Strong v. Ehle*, 86 Mich. 42.

² *Long v. Kaiser*, 81 Mich. 518.

³ *Boone v. Clark*, 129 Ill. 466.

⁴ *Boone v. Clark*, 129 Ill. 466.

⁵ *Boone v. Clark*, 129 Ill. 466.

CHAPTER XLII.

BILLS TO SET ASIDE JUDGMENTS.

The rule is well settled that a court of equity will grant relief against a judgment which is against conscience, or the justice of which can be impeached by facts, or on grounds of which the party could not avail himself at law, or of which he was prevented from availing himself by fraud, accident, mistake or the act of the opposite party, without any act or fraud on his own part.¹

It is a familiar principle that courts of equity will not interpose by injunction to restrain the enforcement of a judgment at law, where the rights of the complainant might have been enforced and protected in the trial at law to the same extent as in a court of equity, where no fraud, accident or mistake has intervened to deprive him of his rights in the legal forum.²

Equity will not relieve a party against a judgment at law on the ground of its being contrary to justice, unless the defend-

¹ *Edson v. Cummings*, 52 Mich. 52; see *Tyler v. Peatt*, 30 Mich. 63; *Hale v. Chandler*, 3 Mich. 531; *Feary v. Cummings*, 41 Mich. 376; *Hinchman v. Town*, 10 Mich. 508; *Scales v. Scott*, 13 Cal. 76; *Massie v. Watt*, 6 Cranch, 148; *Bank v. R. R. Co.*, 28 Vt. 470; *Hilliard on New Trials*, 451; *Freeman on Judgments*, 409, Sec. 486; *Ennor v. R. R. Co.*, 14 Bradw. 327; *McGehee v. Gold*, 68 Ill. 215; *Smith v. Allen*, 63 Ill. 474; *Wilday v. McConnel*, *Ib.* 279; *Gregg v. Brower*, 67 Ill. 532; *Weaver v. Poyer*, 79 Ill. 422; *Brown v. Leuhrs*, *Ib.* 579; *Holmes v. Stateler*, 57 Ill. 211; *Shinkle v. Letcher*, 47 Ill. 216; *Propst v. Meadows*, 13 Ill. 169; *Wierick v. De Zoya*, 2 Gilm. 385; *Abrams*

v. Camp, 3 Scam. 290; *More v. Bagley*, Breese, 94; *Hubbard v. Hobson*, *Ib.* 190; *Ames v. Snider*, 55 Ill. 498; *Ward v. Durham*, 134 Ill. 195; *Mission v. Ex. El. Co.*, 44 Ill. App. 425; *Ass. Co. v. Scammon*, 133 Ill. 627; *Bardonski v. Bardonski*, 144 Ill. 284; *Sutherland v. Reeve*, 151 Ill. 384.

² *Hopkins v. Medley*, 99 Ill. 509; *R. R. Co. v. Holbrook*, 92 Ill. 297; *Clark v. Ewing*, 93 Ill. 572; *Blackburn v. Bell*, 91 Ill. 434; *Noble v. Directors*, 117 Ill. 30; *R. R. v. Ennor*, 116 Ill. 55; *Harding v. Hawkins*, 141 Ill. 572; *Mack v. Doty*, How. Ch. 366; *Kelleher v. Boden*, 55 Mich. 295; *Crim v. Handley*, 94 U. S. 652; *Hendrickson v. Hinckley*, 17 How. 443; *Miller v. Morse*, 23 Mich. 365.

ant was ignorant of his defense pending the suit; or facts could not be received of such defense; or unless, without any neglect on his part, he was prevented by fraud or accident, or the act of the opposite party, from availing himself of such defense.¹

Negligence.—A court of equity will not grant a party relief against a judgment at law, which is the result of his own negligence in not making a proper defense.²

This rule applies to judgments against lands for taxes where the party appears and resists judgment.³

The rule is that a party who has been negligent, and allowed a judgment to be rendered against him through his *laches*, can not come into court and obtain relief as against his own negligent acts. But the principle which precludes a negligent party from obtaining relief, has no application to public officers, who for their own private ends, allow a judgment or decree to pass against the interests of the public, for the reason that the public can only defend by and through its proper representatives.⁴

The negligence of an attorney at law in failing to avail of a legal defense to an action at law, is the negligence of the client, and will preclude relief in equity, although the attorney may be insolvent.⁵

Fraud.—There are two kinds of fraud in respect to judicial proceedings—fraud in obtaining a decree by false evidence, and fraud which gives the court a colorable jurisdiction over the defendant's person. In case of a fraud of the former kind, a decree can not be impeached in a separate and independent proceeding, though it is otherwise in the case of a fraud of the latter kind.⁶

Where the holder of a note, which has been paid, but not taken up, is induced to indorse the same after payment, and it is then taken by another, without his consent, and a suit brought, and judgment rendered thereon against the maker,

¹ *Iron Mining Co. v. Husby*, 72 Mich. 61; *Gray v. Barton*, 62 Mich. 187; Will. Eq. Jur. 358; *Woodworth v. Van Buskerk*, 1 Johns. Ch. 432; *Smith v. Lowrey*, Id. 320; *Miller v. Morse*, 23 Mich. 368.

² *Tone v. Wilson*, 81 Ill. 529; *Neff v. Smyth*, 111 Ill. 100; *Hawley v.*

Simons, 102 Ill. 118; *Harding v. Hawkins*, 141 Ill. 572.

³ Freeman on Judgments, §§ 135-249; *Warren v. Cook*, 116 Ill. 199.

⁴ *Noble v. School Dir.*, 117 Ill. 30.

⁵ *Clark v. Ewing*, 93 Ill. 572; *Bardonski v. Bardonski*, 144 Ill. 284.

⁶ *Burton v. Perry*, 146 Ill. 71.

such indorser becomes liable to an action at the suit of the maker, and has such an interest that he may maintain a bill in equity to enjoin the collection of such judgment and to set it aside.¹

A court of equity will enjoin the enforcement of a judgment fraudulently altered on the records.²

A bill to impeach a judgment or decree for fraud must specifically state the facts relied on as constituting the fraud. The pleader is not required to set forth the evidence, but should state the specific facts which go to establish the alleged fraud.³

Want of jurisdiction.—A court of equity will not set aside a judgment of a court of record for an alleged want of service of process unless the judgment is shown to be unjust and inequitable. This rule applies also to judgments by confession under warrants of attorney.⁴

A judgment rendered without jurisdiction is void, and may be attacked collaterally in any proceeding in which its validity may be called in question. The principle is in no way affected by the fact that the defendant has a right to have such judgment reversed on appeal or error. It is clearly within the jurisdiction of courts of equity to enjoin or vacate such judgment.⁵

And the fact that there may be a remedy at law, does not oust a court of equity of its jurisdiction.⁶

Where a judgment was obtained against the complainant without notice, or his appearance in the cause, and the term at which it was rendered had passed before he had knowledge of the existence of such judgment, his remedy at law is gone, and he may resort to a court of equity to obtain relief therefrom, at least to the extent of obtaining a new trial upon the merits.⁷

Bill by infant.—An infant who has been wronged by a

¹ *Hager v. Buchler*, 6 Brad. 462.

² *Babcock v. McCamant*, 53 Ill. 214.

³ *Stunz v. Stunz*, 131 Ill. 309; *Dinet v. Eigenmann*, 96 Ill. 39.

⁴ *Hier v. Kaufman*, 134 Ill. 215; *Burch v. West*, 134 Ill. 258.

⁵ *Follansbee v. Mtg. Co.*, 7 Brad. 486; *Jones v. Smith*, 14 Ill. 229; *Hurd v. Case*, 32 Ill. 45.

⁶ *Jones v. Smith*, *supra*; *Robins v. Swain*, 68 Ill. 197; *Mack v. Doty*, Harr. Ch. 366.

⁷ *Fisher v. Tribby*, 5 Bradw. 335; *Owens v. Ranstead*, 22 Ill. 161.

decree of a court of chancery can maintain an original bill for relief. Unlike an adult, he may question such decree without applying for a rehearing or filing a bill of review.¹ This right may be exercised at any time by the infant before he attains his majority, or afterward, within the time in which he could successfully prosecute a writ of error to reverse the erroneous decree.²

Relief of sureties on bonds.—Sureties are undoubtedly concluded by the judgment against their principals when it has been obtained in the customary manner and in the course of regular proceedings.³ But this supposes an open and fair pursuit of legal remedies; and when by fraud or collusion with the principal the obligee obtains an advantage of which he seeks to avail himself upon the bond, the sureties may justly say, "This is not the obligation into which we entered. We abide the consequences of the open and public undertaking to which we set our hands, but not of the secret arrangements to which our consent was never invited." And it has been held, that to refer a replevin suit to arbitration without the knowledge and consent of the surety, discharges him.⁴

No. 237. Bill to set aside a judgment at law.

(Venue and address as in No. 235 ante, page 570.)

1. Your orator, A B, of, etc., respectfully represents, that on, etc., one C D, of, etc., commenced an action against your orator, in the — court of the county of —, in said State to the — term, A. D. 18—, of said court to recover the sum of — dollars, alleged to be due from your orator to the said C D, for, etc. (*here insert the subject-matter of said suit*); that at said term your orator appeared and put in pleas in bar to the declaration filed in said cause; that during said term, on, etc., the said cause was ordered by the court to be continued to the next term thereof; that three days after such order was made, and after your orator had returned to his place of

¹ *Richmond v. Tayleur*, 1 P. Wms. 734; Mitf. Eq. Pl. 113; *Davone v. Fanning*, 4 Johns. Ch. 199; *Williams v. Fowler*, 2 J. J. Marsh. 405; *Massie v. Matthews*, 12 Ohio, 451.

² *Grimes v. Grimes*, 143 Ill. 550; *Haines v. Hewitt*, 129 Ill. 347; *Griswold v. Hicks*, 132 Ill. 494; *Coffin v. Argo*, 134 Ill. 276; *Stunz v. Stunz*, 131 Ill. 309.

³ *Williams v. Vail*, 9 Mich. 162;

Lothrop v. Southworth, 5 Mich. 436; *Hershler v. Reynolds*, 22 Iowa, 152.

⁴ *Wright v. Hake*, 38 Mich. 525; see *King v. Baldwin*, 17 Johns. 384; *Viel v. Hoag*, 24 Vt. 46, 51; Freeman on Judgments, 180; *Parkhurst v. Sumner*, 23 Vt. 538; *Rathbone v. Warren*, 10 Johns. 587; *Clark v. Niblo*, 6 Wend. 243; *Churches v. Barker*, 18 N. Y. 466; *Greenlee v. Lowing*, 35 Mich. 63.

residence, and ceased to be in attendance upon said court, and in the absence of one L M, the attorney of your orator, the said C D, plaintiff in said suit, or his attorney, without any notice to your orator, or his said attorney, and without his knowledge or consent, and without the knowledge or consent of your orator's said attorney, fraudulently claiming that the order for said continuance was entered by mistake, procured the said order of continuance to be set aside and vacated; and thereupon, at said term of said court, on, etc., the said cause came on for trial, and a jury was empaneled and sworn to try the issues in said cause; and the plaintiff introduced the evidence on his part, and your orator or his attorney not being present with his witnesses in his behalf, and having no knowledge of said trial, the jury rendered a verdict in favor of the said C D against your orator for the sum of — dollars damages; and on, etc., during the same term, the said court rendered judgment for the amount of said verdict, and the costs of said suit.

2. Your orator further represents, that he resides about — miles from the place where the said court was held, and did not learn of the said trial taking place, or the rendition of said judgment until about, etc., long after the adjournment of said court for said term, and after an execution had been issued upon said judgment, and placed in the hands of one E F, sheriff of said county, to be executed according to law; and the said sheriff threatens to, and is about to levy upon and sell the property of your orator in obedience to said writ of execution.

3. Your orator further represents that, owing to the adjournment of said court, before your orator had any knowledge of the rendition of said judgment, your orator was unable to move the court to set aside said judgment, or pray and obtain an appeal therefrom, or procure a bill of exceptions during the said term, so that your orator's remedy at law became and was lost.

4. Your orator further represents, that he was not at the time of the commencement of the said suit, nor is he now, in any manner indebted to the said C D, as claimed in his declaration in said cause; and the said judgment is, therefore, wholly unjust and inequitable.

Forasmuch, therefore, as your orator is without remedy in the premises, except in a court of equity, your orator prays :

I.

That the said C D, and E F, sheriff as aforesaid, who are made parties defendant to this bill, may be required to make full and direct answer to the same, *but not under oath, the answer under oath being hereby waived;*

II.

That the said judgment so rendered against your orator may be set aside and vacated, and your orator may be granted a new trial in said cause;

III.

That in the meantime your honor will restrain and enjoin the said C D, and the said E F, sheriff of said county, defendants as aforesaid, from levying said execution, or otherwise attempting to enforce said judgment;

IV.

That upon the hearing hereof the court will make such injunction perpetual.

V.

That the court will grant unto your orator such other or further relief in the premises as equity may require, and to the court shall seem meet; (*Add prayer for process and injunction, as in No. 196 ante, page 478.*)

No. 238. *Bill by sureties on replevin bond for relief and to set aside judgment.*¹

(*Venue and address as in No. 235 ante, page 570.*)

1. Your orators J K and L M, of, etc., respectfully represent, that on, etc., one C D had in his possession the following described personal property, to wit: (*Here describe.*) That on the same day, one G H, in the circuit court of the county of —, sued out a writ of replevin against the said C D, to recover the possession of the said goods and chattels; that thereupon your orators, at the request of the said G H, became sureties on his replevin bond given in said cause, in the sum of — dollars; that the said C D appeared and defended the said suit in replevin; and that afterwards, on, etc., the said cause came on for trial in said court, which resulted in a verdict for the said G H, the plaintiff therein; that afterward, on, etc., the said verdict was set aside and a new trial granted in said cause; that afterward, to wit, on, etc., the said C D and G H entered into an agreement and stipulation to the effect that the said C D, the defendant, should take judgment against the said G H, plaintiff in said replevin suit; and that the value of the property so replevied by the plaintiff from the defendant under and by said writ of replevin, was at the time of being replevied — dollars; that the consideration of the said agreement was the payment of — dollars by the said C D to the said G H; that said agreement was entered into by the said C D and G H to defraud and cheat your orators as sureties on said replevin bond as aforesaid; that your orators were never consulted in relation to said agreement, and never consented thereto; that no arrangement was made between the said G H and C D, the plaintiff and defendant in said replevin suit, for the return of the property so replevied to the said C D; but the same, by collusion between said parties, was left in the possession and under the control of the said G H, who was then, and is now, wholly irresponsible and insolvent.

2. Your orators further represent, that in pursuance of the said fraudulent agreement, the said G H abandoned his defense, which coming to the knowledge of your orators, they, at the second trial of said suit, endeavored to defend, but owing to said agreement they were unsuccessful; and the said C D elected to take judgment for the value of said property, and did take a judgment for the sum of — dollars and costs, taxed at — dollars; that your orators had no notice or knowledge of said agreement for the abandonment of said suit, and did not know of its existence, until the fact was brought out in evidence on the trial; that the said C D

¹ See *Wright v. Hake*, 38 Mich. 525.

has taken out an execution on his said judgment, which has been returned unsatisfied; and that since the return of said execution, the said C D has brought suit on the said replevin bond, which was assigned by the sheriff to him for that purpose, against your orators, as sureties as aforesaid.

3. Your orators further represent, that they are informed and believe that they will not be able to interpose the fact herein set forth in defense of the suit on said bond, and can only have relief in a court of equity where matters of this nature are properly cognizable.

Forasmuch, therefore, as your orators are without remedy in the premises, except in a court of equity, your orators pray:

I.

That the said C D and G H, who are made parties defendants to this bill, may be required to make full and direct answer to the same, *but not under oath, the answer under oath being hereby waived;*

II.

That the said suit on the said replevin bond may, on the hearing hereof, be perpetually enjoined;

III.

And that the court will grant unto your orators such other or further relief in the premises as equity may require and to the court shall seem meet.

(Add prayer for process and injunction, as in No. 196 ante, page 478. Also affidavit for temporary injunction.)

CHAPTER XLIII.

BILLS TO CORRECT MISTAKES AND REFORM DEEDS, ETC.

A court of equity has jurisdiction to correct mistakes in deeds and other instruments in writing, and so reform the same as to conform to what was intended between the parties thereto.

When will lie.—Where, in preparing a deed for execution, the scrivener misdescribes the property, when the same is made satisfactorily to appear, courts of equity will correct the mistake, and reform the deed;¹ but the proof must show the mistake to have been mutual.²

The evidence, to show a mistake in a written contract and justify its correction and reformation, must be clear, strong and satisfactory.³ There must be a higher degree of certainty than is to be had from the mere preponderance of evidence.⁴

A deed will not be so reformed by a decree of a court of equity, as to make it appear something entirely different from what is written upon its face, except upon evidence of the clearest and most satisfactory character.⁵ And a rectification

¹ *Clearwater v. Kimler*, 43 Ill. 263; 3 Greenl. on Evidence, section 363; Story's Eq. Jur., sections 155, 157; *Rufner v. McConnel*, 14 Ill. 168; *Shafer v. Davis*, 13 Ill. 395; *Howell v. Howell*, 26 Ill. 460; *Hamlon v. Sullivan*, 11 Bradw. 423; *Ritchie v. Pease*, 114 Ill. 353; *Purvines v. Harrison*, 151 Ill. 219.

² *Conlin v. Masecar*, 80 Mich. 139; *West v. Mahany*, 86 Mich. 121; *Burke v. Clizby*, 75 Mich. 311; *Shouler v. Bonander*, 80 Mich. 531; *Bolen v. Ins. Co.*, 67 Mich. 179; *Sutherland v. Sutherland*, 69 Ill. 481.

³ *Yonell v. Allen*, 18 Mich. 107; *Tripp v. Hasceig*, 20 Mich. 263; 2

Pom. Eq. Jur. § 862; *Sapp v. Phelps*, 92 Ill. 588; *Peck v. Arehart*, 95 Ill. 113; *Bent v. Coleman*, 89 Ill. 364; *Emery v. Mohler*, 69 Ill. 221; *Shay v. Pettes*, 35 Ill. 360; *Goltru v. Sannasack*, 53 Ill. 456; *Hunter v. Bilyeu*, 30 Ill. 228; *Warrick v. Smith*, 36 Ill. App. 619; *Purvines v. Harrison*, 151 Ill. 219; *Burns v. Caskey*, 100 Mich. 94; *Strickland v. Barber*, 76 Mich. 310; *Osterhaut v. Rice*, 93 Mich. 353.

⁴ *Warrick v. Smith*, 36 Ill. App. 619.

⁵ *Palmer v. Converse*, 60 Ill. 313; *Warrick v. Smith*, 137 Ill. 504; *Schwass v. Hershey*, 125 Ill. 653.

can only be made where both parties have executed an instrument under a common mistake, and have done what neither of them intended. A mistake on one side may be grounds for rescinding, but not for correcting or rectifying an agreement.¹

Where a mortgage has been discharged by mistake or by fraud, equity will restore it and give it its original priority as a lien, when the rights of innocent third parties will not be affected.²

Where by mistake a deed describes land not owned by the grantor, instead of that which he intended to convey, and a subsequent grantee of the latter land takes his deed with knowledge of such fact, the first deed will be reformed so as to conform to the intentions of the parties thereto.³

Diligence.—In the absence of fraud or concealment, before a court of equity will interfere because of mistake, even as to a matter of fact, the mistake must be such as the exercise of ordinary diligence would not have prevented.⁴

Mistake as to law.—A mistake of law is an erroneous conclusion as to the legal effect of known facts, the construction of words being a matter of law.⁵ While mistake is an independent head of equity jurisdiction, it has been repeatedly held that a mistake of law will not entitle a party to relief in a court of equity.⁶

To this rule there are exceptions, comprising a large class of cases, where a person has acted under a misapprehension of his existing right of liability.⁷

Mistake of fact.—Mistake of fact has been defined to be a

¹ Kerr on Frauds and Mistakes, 222; 1 Story's Eq. Jur., Sec. 152; Fry on Specific Performance, Sec. 505; *Sutherland v. Sutherland*, 69 Ill. 481; *Emery v. Mohler*, *supra*; *Wilson v. Byers*, 77 Ill. 80; *Home Ins. Co. v. Myer*, 93 Ill. 271; *Purvines v. Harrison*, 151 Ill. 219.

² *Ferguson v. Glassford*, 68 Mich. 36; *Beal v. Congdon*, 75 Mich. 77.

³ *Hoyt v. Gooding*, 99 Mich. 71.

⁴ *Carr v. Hilton*, 1 Curtis, 390; *Farnham v. Brooks*, 9 Pick. 246; *Wood v. Carpenter*, 11 Otto, 143; *Buckner v. Calcute*, 28 Miss. 596;

Stearns v. Page, 7 How. 829; *Bonney v. Stoughton*, 122 Ill. 536.

⁵ *Hurd v. Hall*, 12 Wis. 113; *Purvines v. Harrison*, 151 Ill. 219.

⁶ *Sibert v. McAvoy*, 15 Ill. 106; *Sterns v. Page*, 7 How. 829; *Weed v. Weed*, 94 N. Y. 243; *Fowler v. Black*, 136 Ill. 363; *Dinwiddie v. Self*, 145 Ill. 290; *Carr v. Trainor*, 36 Ill. App. 587; *Paullissen v. Loock*, 38 Ill. App. 510; *Purvines v. Harrison*, 151 Ill. 219.

⁷ *Bonney v. Stoughton*, 122 Ill. 536; *Dinwiddie v. Self*, 145 Ill. 290; 2 Pom. Eq. Jur. § 849.

mistake not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in an unconscious ignorance or forgetfulness of a fact, past or present, material to the contract, or belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of a thing which has not existed.¹

As to voluntary conveyance.—The general rule is, that a court of equity will refuse its aid to decree a specific performance, or rectify a mistake in a contract that is voluntary and without any consideration,² but it may grant relief from a voluntary conveyance induced by fraud.³

As to wife's contracts as to lands of her husband—Dower.—The contracts of a married woman as to the lands of her husband are void; and a mistake in a conveyance of the same can not be reformed as against her.⁴

Where a husband and wife join in the execution of a mortgage on the lands of the husband, which, by mistake, describes the wrong tract of land, a court of equity has no power to correct the mistake, so that the relinquishment of the wife's dower shall apply to land not described in the mortgage, although such land was intended by all the parties to be described therein.⁵

In New York and Ohio, where statutes are similar to ours, the courts have repeatedly refused to enforce the contracts of married women for the conveyance of their real estate, and also to rectify and reform mistakes in deeds made by them for a conveyance of their lands, upon the ground that their deeds, to be effectual, must be acknowledged freely and voluntarily, and in the mode prescribed by the statute.⁶

¹ Pom. Eq. Jur. § 839; *Purvines v. Harrison*, 151 Ill. 219.

² *Redding v. Rozell*, 59 Mich. 476; *Preston v. Williams*, 81 Ill. 176; *Webb v. Ins. Co.*, 5 Gilm. 223; 2 Story's Eq. Jur., Sec. 793; *Spear v. Griffith*, 86 Ill. 552.

³ *Tiffany v. Tiffany*, 68 N. W. Rep. 5; 110 Mich. 219.

⁴ *Knox v. Brady*, 74 Ill. 476; *Moulton v. Hurd*, 20 Ill. 137; *Spurck v. Crook*, 19 Ill. 415; *Martin v. Har-*

gardine, 46 Ill. 322; *Bressler v. Kent*, 61 Ill. 426; *Trustees v. Davison*, 65 Ill. 124; *Edwards v. Schoeneman*, 104 Ill. 278.

⁵ *Martin v. Hargardine*, *supra*; *Graham v. Anderson*, 42 Ill. 514; *Russell v. Rumsey*, 35 Ill. 363.

⁶ *Knowles v. McCambry*, 10 Paige, 342; *Martin v. Derelly*, 6 Wend. 10; *Carr v. Williams*, 10 Ohio, 305; *Purcell v. Harhone*, 17 Ib. 105.

In Illinois, the rule was held under the acts of 1869, and section 18 of 1872, relating to conveyances, that a married woman might, by joining with her husband in the execution of a deed or mortgage relating to the sale or disposition of her real estate, bind and conclude herself, the same as a *feme sole*. And section 9, chapter 68, Revised Statutes of Illinois, 1874, confers upon a married woman the power to sell and convey her lands in the same manner that her husband can sell and convey property belonging to him. By this section a married woman is placed upon a perfect equality with her husband, so far as the conveyance or mortgaging of her lands is concerned; and a court of equity may correct a mistake in the description of the property in a deed or mortgage given by her of her lands in her own right.¹

It will be seen from the authorities cited, that the deed of a married woman prior to the act of 1869 in regard to conveyances, could not be reformed; but since the passage of that act a different rule has prevailed in cases where the conveyance relates to the separate property of the wife; and a court of equity may correct a mistake in the description of such separate property in a deed or mortgage of a married woman respecting her own land; but, it would seem, that as to the lands of her husband her contracts are void; and a mistake in a conveyance of the same can not be corrected or reformed as against her.²

Complainant must show a right.—A complainant who shows no rights under a deed has no equity which will entitle him to have it reformed.³

Amount to give jurisdiction.—A bill in equity to correct a conveyance is not a suit concerning property in the sense intended by the statute, which requires all suits concerning property to be dismissed when the matter in dispute shall not exceed \$100. But if the correcting is merely to bring within the grant a strip of land insignificant in value, the court may dismiss it on that ground.⁴

¹ *Edwards v. Schoeneman*, 104 Ill. 278; *Knox v. Brady*, 74 Ill. 476; *Terry v. College*, 70 Ill. 237; *Hogan v. Hogan*, 89 Ill. 427; *Snell v. Snell*, 123 Ill. 403.

² *Knox v. Brady*, 74 Ill. 476.

³ *Rowley v. Towsley*, 53 Mich. 329; *Ballentine v. Clark*, 38 Mich. 395.

⁴ *Backus v. Jeffreys*, 47 Mich. 127; see *Fuller v. Grand Rapids*, 40 Mich.

Rescission of contract.—A court of equity has jurisdiction to decree the rescission of a contract for non-performance.¹ The rescission of a contract will not be decreed for fraud if the defendant can not be placed in *statu quo*.²

Statute of frauds.—There is a conflict in the books upon the questions of the effect of the statute of frauds upon the jurisdiction of courts of equity to reform instruments made in pursuance of oral agreements, where the correction sought is the addition of lands to those described; but whatever may be the rule where nothing has been done under the oral agreement, in this country the overwhelming weight of authority supports the jurisdiction where part performance is shown sufficient to warrant a specific performance under an oral contract.³

Where a case for the correction of a written contract depends on parol evidence, it is not necessarily established by disproving the defense, though such disproof may aid complainant's *prima facie* showing.⁴

No. 239. Form of bill to correct mistakes in deed.

(Venue and address as in No. 235, ante, page 570.)

1. Your orator, A B, of, etc., respectfully represents that on, etc., your orator purchased from one C D, then living, but since deceased, the following described real estate, situated and being in the county of — in the State of —, to wit: the southwest quarter of section ten (10), in township eight (8) north, of range two (2) of the fourth (4th) P. M., for which your orator then paid the said C D the sum of — dollars, as the purchase price of the said premises.

2. Your orator further represents that on the day and year aforesaid, in pursuance of said purchase by your orator, and in consideration of the payment of the purchase price as aforesaid the said C D did execute, acknowledge and deliver to your orator a warranty deed, intending to convey to your orator the premises aforesaid; but by a mistake of the scrivener who prepared said deed, the premises were described therein as the southwest quarter of section ten (10), township nine (9), (*instead of township eight (8)*), as was mutually intended between your orator and the said C D; that your orator, in ignorance of said mistake in the description of the premises, on,

395; *Blodgett v. Dwight*, 38 Mich. 596; How Stat. § 6613.

¹ *City v. Waterworks*, 99 Mich. 106.

² *Merrill v. Wilson*, 66 Mich. 232.

³ *Lumber Co. v. Iron Co.*, 101 Mich. 577; see *Hurst v. Beaver*, 50 Mich. 612; *Cummings v. Freer*, 26 Mich.

134; *Hunt v. Hunt*, 38 Mich. 164; 1 Greenl. on Ev. § 296; *Sharp v. Thompson*, 100 Ill. 447; *Jenkins v. Sharp*, 27 Wis. 476; 1 Jones on Mort. § 97.

⁴ *Harrington v. Brewer*, 56 Mich. 301.

etc., filed the said deed for record in the recorder's office of said county, and the same was then and there recorded in book "M" of the records of said office, at page 100, as by the said records and the said deed, ready to be produced on the hearing hereof, will more fully appear. Your orator attaches hereto a copy of said deed, marked Exhibit "A" and makes the same a part of this bill of complaint.

3. Your orator further represents that soon after the purchase of said premises, and the execution of said deed, he entered into the possession of said premises, so purchased and intended to be conveyed, and has continued in such possession ever since.

4. Your orator further represents that on, etc., at, etc., the said C D, then being a widower, departed this life intestate, leaving D D, E D and F D, his children and only heirs at law; that the two last-named children, to wit: E D and F D are minors, under the age of fifteen years respectively, and incapable of joining in a conveyance to correct the said mistake in the description of said premises.

5. Your orator further represents that from the time he purchased said premises, and the execution and delivery of said deed by the said C D to your orator, until a few days since, he rested in the belief that the said deed contained a correct description of the premises as purchased.

6. Your orator further represents that by reason of the mistake in the description of the said premises in said deed he is unable to sell or otherwise dispose of the said premises or any part thereof, as he may desire to do.

Forasmuch, therefore, as your orator is without remedy in the premises, except in a court of equity, your orator prays :

I.

That the said D D, E D and F D, who are made parties defendant to this bill, may be required to answer the same, but not under oath, their answer under oath being hereby waived;

II.

That a *guardian ad litem* may be appointed for the said E D and F D, minors as aforesaid;

III.

That the said error or mistake may be corrected and the said deed reformed, so as to truly describe the said premises intended to be conveyed;

IV.

And that your honors may grant to your orator such other or further relief in the premises as equity may require, and to the court may seem meet. (*Pray process as in No. 196, ante, page 478.*)

CHAPTER XLIV.

BILLS TO ENFORCE A VENDOR'S LIEN.

Nature of.—A vendor's lien is an equitable lien allowed the vendor of land sold for the purchase money, where the deed expresses, contrary to the fact, that the purchase money is paid. Unless waived, the lien remains until the whole purchase money is paid,¹ and it may be enforced by the vendor's personal representatives for the benefit of the estate, and also in favor of legatees and creditors.²

Principle governing.—The principle governing courts of equity in the enforcement of liens, is the implied agreement held to exist between the vendor and vendee that the former shall hold a lien on the land sold, for the payment of the purchase price, on the ground that the person who has the estate ought not, in conscience, as between them, keep it and not pay the purchase money.³

Against whom exists.—The lien exists against all the world, except *bona fide* purchasers without notice. It prevails against purchasers from the vendee with notice, or who have only an equitable title; but not against *bona fide* purchasers, for a valuable consideration, without notice; or assignees, under an assignment to specified creditors. It exists against assignees by a general assignment; against a claim of dower by the wife of the vendee.⁴

In what States recognized.—A vendor's lien is recognized

¹ 2 Bouv. L. D. 778; 16 Ves. 329; 2 P. Wms. 291; 1 Vern. 267.

² *Keath v. Horner*, 32 Ill. 524; *Dayhuff v. Dayhuff*, 81 Ill. 500; *Cheesebrough v. Millard*, 1 Johns. Ch. 409.

³ *Beal v. Harrington*, 116 Ill. 113; 2 Story's Eq. Jur. §§ 1219-1225; *Dyer v. Martin*, 4 Scam. (Ill.) 146; *Wilson v. Lyon*, 51 Ill. 166; *Richards v. Arms*, 74 Mich. 57.

⁴ Story's Eq. Jur. §§ 1218-1229; *Champion v. Brown*, 6 Johns. Ch. 398; *Bayley v. Greenleaf*, 7 Wheat. 46; *Schwarz v. Stein*, 29 Md. 112; *Huginin v. Cochrane*, 51 Ill. 302; S. C., 2 Amer. Rep. 303; *Cocke v. Bailey*, 42 Miss. 81; *Green v. Demoss*, 10 Humph. (Tenn.) 371; *Beal v. Harrington*, 116 Ill. 113.

in Michigan, New York, New Jersey, Maryland, Mississippi, Missouri, Alabama, Arkansas, California, Georgia, Florida, Illinois, Indiana, Iowa, Kentucky, Tennessee, Colorado and West Virginia. But to have effect it must be expressly reserved in Ohio and the courts of the United States. In Maine, Kansas, Pennsylvania, North and South Carolina, the doctrine has been exploded. In Vermont and Virginia it has been abolished by statutes; and the vendor by an absolute deed has no lien without a written agreement of the parties to that effect.

In some of the courts in which the existence of the doctrine has been recognized, it has been considered as a dangerous principle, and one opposed to the policy of this country, which discourages secret liens, and tends to make all matters of title subject to record evidence.¹

How created.—It is not necessary that a vendor's lien shall be expressly reserved in a contract for the sale of land. It is implied by the law, in the absence of anything showing an intention to waive it. When expressly reserved it is in the nature of a mortgage, and there is nothing left to implication. But the fact that a vendor retains the legal title in himself, and agrees to part with it only upon full payment of the purchase money, affords conclusive evidence of his intention to reserve his lien. When the price is paid, the vendee becomes the complete equitable owner, and the vendor is simply the trustee or naked owner of the legal title for the vendee.²

The lien must be for some certain amount, known to exist at the time the lien is created.³

The vendor's lien proper, arises in cases where the owner of land conveys the same by deed; thus divesting himself of the legal title; and where some part or all of the purchase

¹ See *Bailey v. Greenleaf*, 7 Wheat. 46; *Conover v. Warren*, 1 Gilm. (Ill.) 498, 502; *McCandlish v. Keen*, 13 Gratt. (Va.) 615; *Doolittle v. Jenkins*, 55 Ill. 400; *Kirkham v. Boston*, 67 Ill. 599.

² *Robinson v. Appleton*, 124 Ill. 276; see *McCaslin v. State*, 44 Ind. 151; *Vail v. Drexel*, 9 Ill. App. Ct.

R. 439; *Pitts v. Peter*, 44 Miss. 247; *Driver v. Hudspeth*, 16 Ala. 348; *Sparks v. Hess*, 15 Cal. 186; *Church v. Smith*, 39 Wis. 492; *Reese v. Burts*, 39 Ga. 565; *Francis v. Wells*, 2 Col. 660; *Johnson v. McGrew*, 42 Iowa, 555; *Balen v. Mercier*, 75 Mich. 42.

³ *Balow v. Ins. Co.*, 77 Mich. 540.

price remains unpaid. In such case, the grantor retains, in equity, a lien for the unpaid purchase money.¹

A vendor's lien upon real estate is a creation of the courts of equity, upon the equitable consideration that where the vendor has taken no security for the purchase money, and done no act showing an intention to waive the lien, it is presumed that it was not the intention of the parties that one should part with, and the other acquire the title without payment of the purchase price of the land. It exists, if at all, independent of any contract; is personal to the vendor; and whenever, from the circumstances, the court can infer that he did not rely upon the lien at the time of the sale, or subsequently abandoned it as security, it will be held to be waived.²

The vendor's equitable lien attaches if possession of the estate has been delivered to the purchaser, although there has been no conveyance of it to him;³ and it attaches upon copyholds and leaseholds, as well as freeholds.⁴

In England the vendor of land to a railroad company has been held to have a lien in respect of unpaid compensation, as well as purchase money, unless such compensation is the subject of a separate agreement between him and the company.⁵

The rule as to the vendor's lien applies with as much force to the case of a purchase by a married woman as to any other case.⁶ But a lien will not be given by a court of equity as a security for unliquidated damages;⁷ and it will not, therefore,

¹ *Robinson v. Appleton*, *supra*, and cases there cited; *Walton v. Hargroves*, 42 Miss. 18; *Richards v. Fisher*, 8 W. Va. 55; *Stafford v. Van Rensselaer*, 9 Cow. 316; *Ledford v. Smith*, 6 Bush (Ky.) 129; *Briscoe v. Bronaugh*, 1 Tex. 325; *Marsh v. Turner*, 4 Mo. 253; *Ross v. Whitson*, 6 Yerg. (Tenn.) 50; *Carr v. Hobbs*, 11 Md. 285; *Deibler v. Barwick*, 4 Blackf. 339.

² *Lehndorf v. Cope*, 122 Ill. 319, 332; *Cowl v. Varnum*, 37 Ill. 184; *Richards v. Leaming*, 27 Ill. 432; *Dunton v. Outhouse*, 64 Mich. 425; *Gorden v. Bell*, 50 Ala. 213; *Holman v. Patterson*, 29 Ark. 357; *Burt v. Wilson*, 28 Cal. 632; *Richards v. Arms*, 74 Mich. 57; *Huston v. Waldron*, 96 Mich. 49.

³ *Smith v. Hibbard*, 2 Dick. 730; *Andrew v. Andrew*, 8 De G. M. & G. 336; *Langstaff v. Nicholson*, 25 Beav. 166.

⁴ *Wrouth v. Dawes*, 25 Beav. 369; *Richardson v. Bowman*, 40 Miss. 782.

⁵ *Walker v. Railway Co.*, Law Rep. 1 Eq. 195; see, also, *Bishop v. Railway Co.*, Law Rep. 5 Eq. 17; *Earl v. Railway Co.*, Law Rep. 11 Eq. 568; see *Dubois v. Hull*, 43 Barb. 26.

⁶ *Chilton v. Braiden*, 2 Black. (U. S.) 458; *Armstrong v. Ross*, 20 N. J. Eq. 109; *Pylant v. Reeves*, 53 Ala. 132.

⁷ *Payne v. Avery*, 21 Mich. 524; *Arlin v. Brown*, 44 N. H. 102.

exist where the consideration of the sale is an engagement to support the vendor during his life.¹ Thus, where a vendee, by his bond, reciting the conveyance of the land to him, as the consideration of such bond, covenanted to maintain the vendor and his son during their natural lives, it was held that the covenant was the substituted consideration for the purchase money; and that the bond was not an equitable incumbrance on the land in behalf, either of the obligee or of his son, who was only a beneficiary.² But it has been held that there is nothing to distinguish an exchange of lands, so far as respects the application of this principle of a lien for the purchase money, from the sale of lands.³ And a vendor who has been fraudulently induced to take land instead of the money, for which he originally agreed, may treat the payment as a nullity, and enforce his lien.⁴ And it has been held that a vendor will not necessarily lose his lien by stipulating that the price shall be paid to a third person.⁵

The vendor's lien upon sale of real estate has always been recognized in Michigan. The doctrine, generally stated, is that the vendor of land who has taken no security, although he has made an absolute deed, and acknowledged the receipt of the purchase price, yet retains an equitable lien for the purchase money, unless there can be an express or implied waiver and discharge of it, which will be enforced in equity against the vendee, volunteers, and all others claiming under him with notice; that is, all persons except *bona fide* purchasers without notice.⁶

The equity of a vendor's lien arises independent of contract; and it is held, therefore, immaterial that the seller had no intention to reserve such a lien.⁷ If the purchaser alleges that

¹ *Ib.*; *McCandlish v. Keen*, 13 Gratt. (Va.) 615.

² *McKillip v. McKillip*, 8 Barb. 552.

³ *Burnes v. Taylor*, 23 Ala. 255.

⁴ *Bradley v. Bosley*, 1 Barb. Ch. 125; and see *Mills v. Bliss*, 55 N. Y. 139.

⁵ *Hamilton v. Gilbert*, 2 Heisk. (Tenn.) 681; *Gault v. Trumbo*, 17 B. Monr. (Ky.) 682; but see *Chapman v. Beardsley*, 31 Conn. 115.

⁶ *Dunton v. Outhouse*, 64 Mich.

419; *Carroll v. Van Rensselaer*, Harr. Ch. 225; *Bayley v. Greenleaf*, 7 Wheat. 46; see *Palmer case*, 1 Doug. (Mich.) 422; *Mowrey v. Vandling*, 9 Mich. 39; *Converse v. Blumrich*, 14 Mich. 109; *Payne v. Atterbury*, Harr. Ch. 414; see *Balen v. Mercier*, 75 Mich. 42; *Walker v. Casgrain*, 101 Mich. 604.

⁷ Sugden on Vendors and Purchasers, 675. But see *Richards v. Arms*, 74 Mich. 57.

the lien does not exist, for any reason, in a particular case, the burden is on him to show the circumstances which repel the presumption of its existence or rebut the equity.¹

As to personal property.—The vendor of personal property has no implied or equitable lien for the purchase money after parting with the possession, but must look alone to the personal responsibility of the vendee,² even though the latter was insolvent, and knew he was unable to pay;³ and still less does such a lien exist in favor of a surety of the vendee, who fears that he may be compelled to pay the price.⁴

When real and personal property are sold under an entire contract for a gross sum, there will be no lien, even as regards the land.⁵ But it is otherwise where it appears that the land and the chattels were valued separately, though conveyed by the same deed.⁶

Waiver of lien.—A vendor of real estate waives his lien, when he takes distinct security for the payment of the purchase money. The mere taking of the bond, bill or note of the vendee is not of itself regarded as an act of waiver; for such instruments are only the evidence of the debt.⁷ But it is waived by the taking of a distinct and independent security, unless there is at the time an express agreement for its retention.⁸ Thus, taking the bond or note of the vendee with a surety,⁹ or the note of another than the vendee¹⁰ or taking a negotiable note, drawn by the purchaser and indorsed by

¹ *Dunton v. Outhouse*, 64 Mich. 425; 4 Kent Com. 152; *Garson v. Green*, 1 Johns. Ch. 308; *Gilman v. Brown*, 1 Mason, 191, 213, 214; *Schnebly v. Ragan*, 7 Gill & Johns. 120, 125; *Tompkins v. Mitchell*, 2 Rand. 428, 429; *Allen v. Bennett*, 8 Smedes & M. 681; *Campbell v. Baldwin*, 2 Humph. 248, 258; *Manley v. Slason*, 21 Vt. 271; *Wilson v. Lyon*, 51 Ill. 166.

² *James v. Bird*, 8 Leigh. (Va.) 510; *Lupin v. Marie*, 6 Wend. 77.

³ *Johnson v. Farnum*, 56 Ga. 144.

⁴ *Beam v. Blanton*, 3 Ired. (N. C.) Eq. 59.

⁵ *McCandlish v. Keen*, 13 Gratt. (Va.) 605.

⁶ *Russell v. McCormick*, 45 Ala. 587; 6 Amer. Rep. 707.

⁷ *Conover v. Warren*, 1 Gilm. (Ill.) 498; *Lehndorf v. Cope*, 122 Ill. 332; *Winter v. Anson*, 3 Russ. 488; *Christian v. Austin*, 36 Texas, 540; *Selby v. Stanley*, 4 Minn. 34; *Dunlap v. Shanklin*, 10 W. Va. 662; *Beal v. Harrington*, 116 Ill. 113. *Donavon v. Donavon*, 85 Mich. 63.

⁸ *Ib.*; *Baum v. Grigsby*, 21 Cal. 172; *Land Co. v. Peck*, 112 Ill. 408.

⁹ *Carrico v. Nat. Bank*, 33 Md. 235; *Boon v. Murphy*, 6 Blackf. 273; *Beal v. Harrington*, *supra*.

¹⁰ *Bank v. Filn*, 83 Mich. 496.

a third person, or drawn by a third person and indorsed by the vendee,¹ or taking a mortgage on other property, presumptively repels the lien.²

One who has assigned a note taken as part of the price, and is held only as indorser, and has not paid the note, can not claim a purchase money lien.³

An express security on the land itself for the whole amount unpaid, as by mortgage or deed of trust, will merge the implied lien.⁴ And an express security or an express contract for a lien on the land conveyed, as to part of the amount remaining unpaid, will be an implied waiver of the lien to any greater extent.⁵ And it has been held that taking a mortgage for the purchase money excludes the lien, although the security is defective or inadequate.⁶ But taking a mortgage, or other collateral security will not extinguish the lien, when there is an express agreement that it shall survive.⁷

And, generally, whether there has been a waiver of a vendor's lien is a question of intention. Thus, if a vendor takes a note for the purchase money with security, it raises a presumption of a waiver; because, ordinarily, it evinces an intention to rely on the personal security, and to abandon the lien; but if the attendant circumstances, or the positive testimony of the vendor show that such was not his intent, the presumption is rebutted.⁸

Not assignable or transferable.—Upon the question whether the benefit of the vendor's equity, or implied lien, accompanies an assignment of the vendee's note or bond given for the purchase money, the decisions are somewhat conflicting. In some of the States there is no distinction between the vendor's lien and any express lien as to transferability; and

¹ *Boynton v. Champlin*, 42 Ill. 57; *Durette v. Briggs*, 47 Mo. 356; *Schwarz v. Stein*, 29 Md. 112; *Yargan v. Shriner*, 26 Ind. 364.

² *White v. Dougherty*, Mart. & Y. (Tenn.) 309; *Richardson v. Ridgely*, 8 Gill & Johns. (Md.) 87; *Marshall v. Christian*, 3 Humph. (Tenn.) 616; *Kirkham v. Boston*, 67 Ill. 599; *Perry v. Grant*, 10 R. I. 334; *Ryhiener v. Frank*, 105 Ill. 326.

³ *Bank v. Feln*, 83 Mich. 496.

⁴ *Mattix v. Weand*, 19 Ind. 151; *Little v. Brown*, 2 Leigh (Va.) 353; But see *Boos v. Ewing*, 17 Ohio, 500.

⁵ *Fish v. Howland*, 1 Paige Ch. 20, 30; *Brown v. Gilman*, 4 Wheat. 256.

⁶ *Camden v. Vail*, 23 Cal. 633.

⁷ *Daughaday v. Paine*, 6 Minn. 443.

⁸ *Cordova v. Hood*, 17 Wall. 1; *Mims v. R. R. Co.*, 3 Kelly (Ga.), 333; *Napier v. Jones*, 47 Ala. 90.

the assignment of the note or bond given for the purchase money is held to carry the lien with it.¹ But according to the weight of authority elsewhere, the vendor's lien is a mere personal equitable right in the vendor, and is not assignable or transferable, even by express contract between the vendor and an assignee. It looks only to the security of the vendor, and does not pass to the assignee of the vendee's obligation for the consideration money, and consequently, can not be enforced in his favor. It can be enforced only by the vendor himself.²

But a third person who pays the purchase money on behalf of the purchaser to the vendor, upon an express agreement between the three that he shall have a lien for it upon the land, will be held, in equity, to succeed to the vendor's lien.³ And in a recent case in New York it was held that the vendor's lien is capable of being assigned with the debt, for the payment of which it is security; but the lien ceases to exist whenever the acts of the vendor manifest that it is not relied upon. Hence, if he so assigns the debt as to have no further interest in its payment, and omits to assign the lien in terms, the lien is destroyed.⁴

Frame of bill.—When a vendor resorts to a court of equity to declare and enforce his lien, it is necessary that he allege the contract of sale with reasonable certainty; and that the consideration and terms of payment be alleged, and clearly proven; otherwise the court has no data for the enforcement of the lien.⁵

¹ See *Fisher v. Johnson*, 5 Ired. 492; *Honore v. Bakewell*, 6 B. Monr. (Ky.) 67; *Rakestraw v. Hamilton*, 14 Iowa, 147; *Wells v. Morrow*, 38 Ala. 125.

² *Richards v. Leaming*, 27 Ill. 432; *Bonnell v. Holt*, 89 Ill. 71; *Keith v. Horner*, 32 Ill. 524; *McLaurie v. Thomas*, 39 Ill. 291; *Markoe v. Andras*, 67 Ill. 34; *Moshier v. Meek*, 80 Ill. 79; *Lehndorf v. Cope*, 122 Ill. 333; *Wing v. Goodman*, 75 Ill. 159; *Webb v. Robinson*, 14 Ga. 216; *Simpson v. Montgomery*, 25 Ark. 365; *Baum v. Grigsby*, 21 Cal. 173; *Walsh*

v. Boyle, 30 Md. 262; *Sheratz v. Nickodemus*, 7 Yerg. (Tenn.) 9; *Horton v. Horner*, 14 Ohio, 437; *Lindsey v. Bates*, 42 Miss. 397; *Ross v. Heintzen*, 36 Cal. 313; *Hecht v. Spears*, 27 Ark. 229; 11 Amer. Rep. 784; *Small v. Stagg*, 95 Ill. 39; *Elder v. Jones*, 85 Ill. 334.

³ *Mitchell v. Butt*, 45 Ga. 162.

⁴ *Smith v. Smith*, 9 Abb. (N. S.) 420; see *White v. Williams*, 1 Paige Ch. 502; *Hollock v. Smith*, 3 Barb. 267; *Gruhn v. Richardson*, 128 Ill. 178.

⁵ *Mowrey v. Vandling*, 9 Mich. 39;

No. 240. Bill for a vendor's lien.

STATE OF MICHIGAN. }
 County of ———. }

To the Circuit Court for the County of ———. In Chancery.

1. Your orator, A B, of, etc., respectfully represents, that on, etc., your orator, being the owner in fee simple of the following described real estate, to wit: (*here describe the same,*) and being desirous of selling such premises, and one C D being minded to purchase the same, your orator thereupon sold and conveyed the said premises, by a warranty deed of that date, to the said C D, for the agreed price and consideration of — dollars; of which said agreed purchase money or price the said C D paid your orator — dollars in cash, and for the residue thereof the said C D executed and delivered to your orator his certain promissory notes of the same date for the sum of — dollars, one payable in — year- after its date, and another in — year- after date, with interest at the rate of — per cent per annum; a copy of which said deed of conveyance is hereto attached, marked Exhibit A; and copies of said promissory notes are also hereto attached, marked Exhibits B and C; which said exhibits are hereby made a part of this bill of complaint.

2. Your orator further represents, that on or about the day the said deed bears date, the said C D went into the actual possession of the said premises, and has continued in such possession ever since, and has enjoyed the rents and profits thereof.

3. Your orator further represents, that the said C D has not yet paid the said principal sums of — due on said promissory notes, or the interest due thereon, or any part thereof, although the same have long since become due and payable, according to the terms of said promissory notes.

4. Your orator further represents, that no proceedings at law have been had to recover the amounts so due your orator for the balance of said purchase money, or any part thereof; and your orator has never received from the said C D any other security for the amounts so due as aforesaid, or for any part thereof.

5. Your orator further represents, that he is advised by counsel, and believes, and so states the fact to be, that he has a just and equitable lien upon the said described premises for the payment of the said balance of the said purchase money, on which there is due for principal and interest the sum of — dollars.

Forasmuch, therefore, as your orator is without remedy in the premises. except in a court of equity, your orator prays :

I.

That the said C D, who is made a party defendant to this bill, may be required to make full and direct answer to the same, *but not under oath. the answer under oath being hereby waived;*

II.

That upon the hearing hereof, an account may be taken by or under the direction of the court of the amount due your orator for the balance of said purchase money as aforesaid;

Dutton v. Outhouse, 64 Mich. 426; see *Dutton v. Outhouse*, 64 Mich.
Waterfield v. Wilber, 64 Mich. 642. 421, 422.

For a form of bill, and answer,

III.

That the amount so found to be due may be declared to be a lien upon the premises aforesaid, in favor of your orator, to secure the balance of said purchase money, and interest;

IV.

That the defendant, C D, be decreed to pay your orator the amount found to be due, with interest and costs, by a short day to be fixed by the court;

V.

That in default of such payment, the said premises may be sold, as the court may direct, to satisfy the amount so found to be due, with interest, and the costs of this proceeding;

VI.

That in case of such sale, the defendant, C D, and all persons claiming by, through or under him, by conveyance or otherwise, since the commencement of this suit, may be forever barred and foreclosed of and from all right or equity of redemption of the said described premises;

VII.

That the defendant, and all persons claiming under him, or who may have come into possession of the said premises, or any portion thereof, during the pendency of this suit, deliver and yield up the possession thereof to the purchaser or purchasers thereof at the said sale, on his, her, or their producing to him or them, or to the person or persons in possession of said premises, or any portion thereof, the deed or deeds executed by the commissioner pursuant to such sale, and a certified copy of the order of court confirming the report of such sale, after such order has become absolute;

VIII.

That the defendant, C D, pay to your orator any balance that shall remain due your orator, if the sale of such premises as aforesaid shall fail to produce sufficient proceeds to pay the whole of the amount of said purchase money, interest and the costs of this suit; and that in such case, your orator may have execution for the collection of such balance, and the costs thereon, according to the rules and practice of this court;

IX.

And that your orator may have such other or further relief in the premises as shall be agreeable to equity and good conscience.

E F,

A B.

Solicitor for complainant.

The decree.—Where a vendor's lien is decreed it should provide for the payment of the amount of the purchase money remaining due from the purchaser to the vendor; that the same shall be a lien upon the premises; and that the defendant redeem the same by the payment of the sum remaining due within a certain time, or, in default thereof, that all and singular the premises be sold, etc.¹

¹ *Carroll v. Van Rensselaer*, Harr. Ch. 225.

CHAPTER XLV.

INJUNCTIONS.

- Section 1. NATURE AND OBJECT OF THE WRIT.
2. JURISDICTION.
3. IN WHAT CASES GRANTED.
4. PLEADINGS.
5. PRACTICE—FORMS, ETC.
6. DISSOLUTION.

SECTION I.

NATURE AND OBJECT OF THE WRIT.

An injunction is a prohibitory writ, used by courts of equity to grant relief by injunction in those cases in which, but for their interposition, an equitable right would be infringed. In such case courts of law can afford no remedy, for they can not adjudicate upon an equity, and are powerless to prevent an invasion of it. Where, then, the rights of a party are wholly equitable in their nature, he can find no redress in the common law tribunals, but the mere existence of an equitable element in a suit being regarded by these courts as no bar to their procedure, they take jurisdiction, and in deciding upon the legal merits of the case, must sometimes disregard the equity, because its recognition does not lie within their competence as courts of law.

In such cases as these, a court of equity, in the exercise of its distinctive jurisdiction, will interpose by injunction to protect the equity. This protection consists in restraining, in behalf of the complainant, the commission or continuance of some act of the defendant.

An injunction is defined to be a writ, framed according to the circumstances of the case, commanding an act which the court regards as essential to justice, or restraining an act which it esteems contrary to equity and good conscience.

A bill for an injunction will not be sustained unless the right it aims to secure can be determined in advance with reasonable certainty.¹

Injunction will not lie for the purpose of passing on abstract rights or wrongs, apart from such threatened injury to the person seeking relief, nor when the injury is remediable at law.²

SECTION II.

JURISDICTION.

One court has no jurisdiction to enjoin another;³ or to restrain a suit or proceeding previously begun in a court of a sister State or in a Federal Court;⁴ or to restrain proceedings just commenced and already pending in another court of co-ordinate jurisdiction;⁵ or to restrain competent proceedings upon a judgment obtained in another court of like jurisdiction.⁶

A bill will not lie merely for an injunction and receivership pending another suit in the same court covering all rights in the disputed property. Interference with such rights can be restrained in such other suit.⁷

Possession of lands is not to be disturbed or changed by means of a preliminary injunction.⁸

An injunction against a party's holding his own possession is the same thing as turning him out of possession, which can not be legally done before a final decree.⁹

The granting of a preliminary writ of injunction is a discretionary power vested in courts of original jurisdiction, and such writ is not a matter of right, particularly in cases where the parties may be fully protected by final decree or by a suit at law.¹⁰

¹ *Bennett v. Seligman*, 32 Mich. 500; *Bradfield v. Dewell*, 48 Mich. 9; *Smith v. Blake*, 96 Mich. 542.

² *R. Co. v. Wildman*, 58 Mich. 286.

³ *Mabley v. Superior Court Judge*, 41 Mich. 31.

⁴ *Carroll v. Bank*, Har. Ch. 197.

⁵ *Barnum v. Speed*, 59 Mich. 272.

⁶ *Maclean v. Wayne*, 52 Mich. 257.

⁷ *Beekman v. Fletcher*, 48 Mich. 156.

⁸ *People v. Simonson*, 10 Mich. 335; *Arnold v. Bright*, 41 Mich. 207.

⁹ *Ry. Co. v. R. R. Co.*, 61 Mich. 10.

¹⁰ *Plank Road Co. v. Frazer*, 98 Mich. 141.

SECTION III.

IN WHAT CASES GRANTED.

An injunction does not lie where the complaint is not that a new grievance is being created, but that an old one is not stopped.¹

Courts of equity will not, as a general rule, interfere to restrain criminal or *quasi* criminal prosecutions, or take jurisdiction of any case or matter not strictly of a civil nature.²

An injunction will be granted at the suit of one who has purchased a mill, on the foreclosure of a mortgage thereon, to restrain the former owner from meddling with the dam and race to the complainant's injury, if they are the only source of supply, and remain on the latter's premises.³

To restrain misapplication of public money.—A bill in equity will lie at the suit of any tax payer of the State or municipality to enjoin the action of public agents or officers which will lead to the misapplication of public money, or the payment of such money on illegal contracts, or without authority of law.⁴

To restrain trespasses.—There are two exceptions, clearly recognized, to the rule that courts of equity will not interfere to restrain trespasses, whether committed under the forms of law or otherwise, which are, *first*, to prevent irreparable injury, and *second*, to prevent a multiplicity of suits.⁵

Where the trespass sought to be enjoined is an act of official oppression by public officers and agents, under color of office, a less grievance constitutes a ground for an interference by equity than when the trespass is by a private person.⁶

To restrain a threatened injury to land.—Courts of chan-

¹ *Cooper v. Detroit*, 42 Mich. 585.

² *Poyer v. Village*, 123 Ill. 111; Story's Eq. Jur., Sec. 893; Dan. Ch. Pr. 1620; *R. R. Co. v. Walton*, 14 Ala. 209; *Skakel v. Roach*, 27 Ill. App. Ct. R. 423.

³ *Curtis v. Norton*, 58 Mich. 411.

⁴ *Cooper v. Alden*, Har. Ch. 72; *Littler v. Jayne*, 124 Ill. 124; *Colton v. Hanchett*, 13 Ill. 615; *Perry v. Kinneear*, 42 Ill. 160; *Beauchamp*

v. Kankakee Co., 45 Ill. 274; *Barker v. Township*, 63 Mich. 516; *Winslow v. Jennes*, 64 Mich. 84; *City of Alpena v. Kelley*, 97 Mich. 550;

⁵ *Mayor v. Meserole*, 26 Wend. 132; *Moore v. Smedley*, 6 Johns. Ch. 28; *Owens v. Crosselt*, 105 Ill. 356; *Garside v. City*, 43 Ill. 47; *Power v. Village*, 123 Ill. 117.

⁶ *Ryan v. Brown*, 18 Mich. 196.

cery will not grant an injunction in every case of permanent injury to real estate, but will look at all the facts and circumstances and grant or withhold relief as justice and equity may require.¹

Equity will enjoin a threatened injury to real estate if of such a nature as to materially lessen its enjoyment by the owner, and his rights therein. And an encroachment on land which, if allowed to continue, will open into a title, will be restrained to prevent a multiplicity of suits.²

To restrain a diversion of water.—An injunction is proper to prevent an improper diversion of surface water.³

Injunction lies to restrain a township drain commissioner from fraudulently running a drain for the special benefit of his own property, and at the expense of the complainants, who are not benefited, but are injured by the consequent interference with an ancient water-course in which they have rights.⁴

To restrain a nuisance.—An injunction will lie to restrain a city from destroying a structure as a nuisance before it has been condemned as illegal.⁵

A party will be enjoined from emptying, by drain or otherwise, the waters of sag-holes in his land, other than the natural overflow, upon another's land.⁶

To restrain ejectment.—An equitable owner of land in actual possession, and claiming title in fee simple, can maintain a bill to enjoin a suit in ejectment brought against him by a person claiming under a succession of conveyances given in bad faith, and for the purpose of defeating creditors; and in the same bill he can also ask for a release of the apparent title held by such claimant.⁷

¹ *Potter v. Ry.*, 83 Mich. 285.

² *Mfg. Co. v. Ry. Co.*, 64 Mich. 115; *White v. Forbes*, Walk. Ch. 113; *Stone v. Lumber Co.*, 59 Mich. 24; 1 High on Inj., Sec. 702; Washb. on Easements, 242; *Vanderslip v. Gr. Rapids*, 78 Mich. 522.

³ *Hicks v. Silliman*, 93 Ill. 255; *Rummell v. Lamb*, 100 Ill. 424; *Hiliker v. Coleman*, 73 Mich. 170.

⁴ *Zabel v. Harshman*, 68 Mich.

273; *Tomlin v. Newcomb*, 70 Mich. 358; see *Norris v. Hill*, 1 Mich. 202; *Fox v. Holcomb*, 32 Mich. 494; *Gilison v. Cressman*, 100 Mich. 591.

⁵ *Everett v. Marquette*, 53 Mich. 450; *F. Ins. Co. v. Peck*, 102 Ill. 205; *Gilbert v. Showerman*, 23 Mich. 453.

⁶ *Gregory v. Bush*, 64 Mich. 37.

⁷ *McKibbin v. Bristol*, 50 Mich. 319.

Ejectment suits for a part of the premises may be enjoined where the complainant has a right to file a bill to quiet title to the whole, thus saving multiplicity of suits.¹

One who claims the legal title to land under a will has no reason for resorting to equity to restrain an action of ejectment against him, except when the common law is inadequate to give full relief.²

To restrain collection of note.—If the collection of a note is enjoined, the judge or master may require the complainant to give security for the payment of the debt in case he fails to maintain the suit.³

To restrain conveyances, etc.—Courts of equity will restrain unjust conveyances of real estate, or the transfer of stocks during the pendency of suits which concern them; they will forbid the publication of private papers, letters or manuscript; they will enjoin a husband's transfer of property in fraud of the legal or equitable rights of the wife, such as alimony, etc.⁴

Sureties on a replevin bond can enjoin the prosecution of a suit thereon where their principal, without their knowledge, has stipulated that defendant may take judgment.⁵

To restrain collection of taxes.—The statute of Michigan provides that "no injunction shall issue to stay proceedings for the assessment or collection of taxes" under the revenue act.⁶

The legislature has the constitutional authority, where it has provided a plain, adequate and complete remedy at law to recover back taxes illegally assessed and collected, to take away the remedy by injunction to restrain their collection.⁷

Before this statute, it was held that the illegality in a tax or assessment, resulting from a want of any law, general or

¹ *Woods v. Monroe*, 17 Mich. 238.

² *Shaw v. Chambers*, 48 Mich. 355.

³ *Barnes v. Brookman*, 107 Ill. 317.

⁴ *Ins. Co. v. Peck*, 102 Ill. 265;
Vanzant v. Vanzant, 23 Ill. 536.

⁵ *Wright v. Hake*, 38 Mich. 525.

⁶ How. St. Supp. § 1170 k; Public Acts, 1839, No. 195, page 267; *Putnam v. Grand Rapids*, 58 Mich. 416;

Eddy v. Lee, 73 Mich. 123; *Walsh v. King*, 74 Mich. 350.

⁷ *Eddy v. Township of Lee*, 73 Mich. 123; see Cooley on Taxation (2d Ed.) 762, note 2; *Snyder v. Marks*, 109 U. S. 189; *U. S. v. Black*, 11 Blatchf. 543; *Alkan v. Bean*, 8 Biss. 83; *Auditor Gen'l v. Iosco Circuit Judge*, 58 Mich. 545.

special, authorizing it, would justify a court of equity in enjoining its collection.¹

To restrain waste.—After the commencement of any action on the case for waste, or of any action for the recovery of land, or of the possession of land, the defendant shall not make any waste of the land in demand, or premises in question, during the pendency of the suit; and if such defendant shall commit any waste thereon, or shall threaten to make preparations to commit waste thereon, the court in which such suit is pending, or any circuit judge, or circuit court commissioner, either in term or vacation, shall have power, on the application of the plaintiff, to make an order restraining the defendant from the commission of any waste, or further waste thereon.²

If any person shall commit, or threaten, or make preparation to commit any waste on any real estate which shall be attached or levied upon by execution in any civil action, the court from which such execution or attachment shall have issued, any circuit judge or circuit court commissioner may, on the application of the plaintiff, either in term or vacation, make an order restraining such person from committing any waste or further waste thereon.³

An injunction may issue to restrain waste, in favor of a holder of a certificate of purchase at a tax sale;⁴ and in favor of the township treasurer, where taxes are due and unpaid, in cases where such lands are chiefly valuable for timber.⁵

See Chapter 39 ante, entitled *Bills to Restrain Waste*.

To restrain unlawful retention of water.—Equity will enjoin the retention of water, for flooding purposes, to an extent to prevent riparian owners from getting constantly the natural volume of the stream; and the letting out of floods which will injure his dam.⁶

Generally.—Equity has jurisdiction to enjoin the fraudulent

¹ *Merrill v. Auditor*, 24 Mich. 436;
Conway v. Waverly, 15 Mich. 257;
Palmer v. Napoleon, 16 Mich. 176;
Keigwin v. Com'rs, 115 Ill. 347; *R.*
R. Co. v. Donoghue, 127 Ill. 27.

² How. Stat. Sec. 7946.

³ How. Stat. Sec. 7947.

⁴ Public Acts 1889, No. 105, p. 267.

⁵ How. St. § 1170, n. 1; Public Acts 1889, No. 223, p. 330.

⁶ *Koopman v. Blodgett*, 70 Mich. 610; see *Witheral v. Booming Co.*, 68 Mich. 48; *Anderson v. Boom Co.*, 61 Mich. 489; *Gd. Rapids v. Powers*, 89 Mich. 94; *Mathewson v. Hoffman*, 77 Mich. 420.

execution of a trust;¹ and to enjoin the action of township boards of health in establishing burial places, should they proceed to exercise it illegally or improperly to the injury of others.²

The operation of a machine shop in a neighborhood otherwise given up to costly residences, may be restrained.³

The owner of a trade secret is entitled to an injunction against one who, in violation of contract, and in breach of confidence, undertakes to apply the secret to his own use, or to disclose it to a third person.⁴

An injunction will be granted to restrain interference by members of a parish with the management of the property by the proper officers.⁵

An adjacent property owner, whose rights are threatened by an erection to be made by an adjoining owner, will be entitled to an injunction.⁶

Injunction will lie to prevent a plank-road company from using other material than that required by statute.⁷

Injunction will not lie to restrain the removal of a fence to another alleged boundary line, when the boundary line has not been fixed in a proceeding at law.⁸

Courts of chancery have no jurisdiction to restrain the threatened violation of a municipal ordinance unless the act amounts to a nuisance.⁹

Chancery may grant preventive, as well as remedial relief.¹⁰

The administration and marshaling of assets, and marshaling of securities, furnish illustrations of the interposition of courts of equity by injunction to control the proceedings of creditors and others at law; and upon principle, almost purely

¹ *Morrison v. Mayer*, 63 Mich. 238.

² *Upjohn v. Richland Board of Health*, 46 Mich. 542.

³ *McMorran v. Fitzgerald*, 106 Mich. 649.

⁴ *Thum Co. v. Tioczinski*, 114 Mich. 149.

⁵ *Richter v. Kabot*, 72 N. W. Rep. 600; 114 Mich. 575.

⁶ *Calumet v. Siehl*, 67 N. W. Rep. 467; 48 Neb. 505.

⁷ *Plank Road Co. v. Macomb*, 67 N. W. Rep. 53; 109 Mich. 371.

⁸ *Andries v. Ry. Co.*, 105 Mich. 557.

⁹ *St. Johns v. McFarland*, 33 Mich. 72.

¹⁰ *Baxter v. Board of Trade*, 83 Ill. 146; *Fisher v. Board of Trade*, 80 Ill. 85; *Menard v. Hood*, 68 Ill. 121; *People v. City*, 5 Gilm. (Ill.) 351.

of an equitable nature; a second class of cases includes those in which an equitable element is involved, but the matter of which otherwise is cognizable at law. If in such cases the courts of law have already taken jurisdiction, a court of equity will in a proper case restrain their further procedure.

Thus when fraud, accident or mistake has given one party to the suit an unfair advantage over his opponent, an equity arises in favor of the latter which will be protected by injunction. For example, if, after judgment against the defendant at law, a receipt is found, showing the payment of the very debt upon which he has been condemned, if there be no remedy in such case at law, equity will enjoin, and so prevent the execution of the judgment.¹

See additional recent cases noted below.²

Injunctions may be either temporary, when they are granted for a limited time, or until the filing of the defendant's answer, or the hearing by the court; or perpetual, when, in the opinion of the court, after a hearing of the case, the complainant has established his right to such relief.³

SECTION IV.

PLEADINGS.

When bill must be sworn to.—Where an injunction bill is framed as a mere pleading to obtain relief only on a final hearing, and not to be used as the basis of an application for preliminary relief, and where the case exhibited is within the ordinary jurisdiction in equity, and stands on no peculiar ground which might call for a verification of the bill, the objection that it should be sworn to is unwarranted.⁴

The failure to verify an injunction bill is of no importance except for the purpose of a motion for an injunction.⁵

¹ 1 Bouvier's L. D. 301, and numerous cases there cited.

² *Barber v. St. Ry.*, 83 Mich. 299; *Ry. Co. v. Mills*, 85 Mich. 634; *Nichols v. St. Ry.*, 87 Mich. 361; *Flaherty v. Moran*, 81 Mich. 52; *Kirkwood v. Finnegan*, 95 Mich. 543; *Lathrop v. Elsner*, 93 Mich. 599; *Dixon v.*

Detroit, 86 Mich. 516; *Henriques v. Bank*, 84 Mich. 168; *Hinker v. Baldwin*, 93 Mich. 422; *Werthheimer v. Wayne Judge*, 83 Mich. 56.

³ *Harbison v. Houghton*, 41 Ill. 522; *Min. Co. v. Allen*, 95 Ill. 288.

⁴ *Robinson v. Baugh*, 31 Mich. 290.

⁵ *Glidden v. Norvell*, 44 Mich. 203.

But a bill asking for a preliminary injunction must be sworn to on personal knowledge of facts that will justify its issue; or reason must be shown for the absence of such verification.¹ So, a trustee can not get an immediate injunction against his co-trustee on an unsworn bill.²

SECTION V.

PRACTICE.

By whom granted.—An injunction may be allowed by the judge of the Circuit Court, and courts of like jurisdiction; and in certain cases, and under the restrictions of the rules and practice, by a circuit court commissioner.

Chancery Rule 21 provides, that:

1. No circuit court commissioner shall be empowered to vacate any order or decree of the Circuit Court or any order made by a circuit judge.

2. Nor shall he grant any injunction to stay proceedings at law, unless reasonable notice of the time and place of hearing the application therefor shall have been previously given to the adverse party.

3. Nor shall he grant any injunction without such notice, in any case, unless the judge of the Circuit Court in which the application is made shall be absent from the county at the time of such application, or is disqualified from granting an injunction in the cause, nor unless in the opinion of such commissioner the peculiar exigencies of the case require it, for manifest reasons, to be shown by affidavit of the facts and circumstances.

4. Nor shall he grant any injunction restraining the execution or performance of any public improvement, nor to compel a defendant to refrain from doing any act where the injunction will necessarily produce great and irreparable injury to the defendant, if the claim of the complainant is not sustained. Nor shall he grant any injunction in any case where no special provision is made by law as to security,

¹ *Lumbering Co. v. Lovejoy*, 55 Mich. 190; *Toledo R. Co. v. R. Co.*, 61 Mich. 9; see Chancery Rule 21.

² *Cicotte v. Anciaux*, 53 Mich. 228.

except where the injunction prayed for is against a judgment debtor who is made defendant in a creditor's bill, unless the officer granting the same shall take from the complainant or his agent a bond to the party enjoined, in such sum as shall be deemed sufficient, and in not less than five hundred dollars, with sufficient surety or sureties to be approved of by the officer allowing the injunction, conditioned to pay the party enjoined such damages as he may sustain by reason of the injunction, if the court shall eventually decide that the complainant was not equitably entitled to such injunction; such damages to be ascertained by a reference to a circuit court commissioner, or by the court having jurisdiction of the cause in which the injunction issued, as such court shall direct.

Such officer allowing the injunction shall, before the register shall issue the writ, file such bond with such register in chancery, who shall carefully preserve the same for the benefit of the obligee therein named.¹

Notice of application.—It will be seen from Rule 21, just quoted, that in nearly every instance a notice of the application for an injunction is required, to authorize the officer to act;² unless the peculiar exigencies require it “for manifest reasons to be shown by affidavit.”³

No. 241. Notice of application to circuit judge for injunction.

(*Venue, and title of cause as in No. 240, ante, page 610.*)

To the above named defendants :

Take notice that on, etc., or as soon thereafter as counsel can be heard, the complainant will make an application to the honorable judge of the Circuit Court of said county, at his chambers, in, etc., for an injunction as prayed in the bill now on file in said entitled cause; with a copy of which you are herewith served; at which time and place you can appear and resist said application if you see fit to do so.

Dated, etc.

E F,
Solicitor for complainant.

No. 242. Affidavit that judge is absent from county.

(*Venue, and title of cause as in No. 240, ante, page 610.*)

A B, the above named complainant, on oath states that the honorable

¹ Chan. Rule 21; How. St. §§ 6419, 7150, 7154; *Boinay v. Coats*, 17 Mich. 415; *Manistique v. Lovejoy*, 55 Mich. 193.

Mich. 411; *Lumbering Co. v. Lovejoy*, 55 Mich. 189.

³ *Tol. R. Co. v. Det. R. Co.*, 61 Mich. 9.

² See, also, *Boinay v. Coats*, 17

——, judge of the Circuit Court of said county, is absent from said county and can not hear the application for an injunction in said cause (*or being present*, “ is disqualified from granting an injunction in said cause; for the reason that,” etc., *set forth the reasons.*)

Affiant therefore prays that the circuit court commissioner of said county may grant the injunction as prayed in the bill now on file in said cause.

A B.

(*Add jurat.*)

No. 243. Notice of application to circuit court commissioner for injunction, —— the judge being absent, etc.

(*Venue, and title of cause as in No. 240, ante, page 610.*)

To the above named defendants :

Take notice that the judge of the Circuit Court in and for said county, being absent from said county, the complainant will, on, etc., or as soon thereafter as counsel can be heard, make an application to G H, circuit court commissioner in and for said county, at his office in, etc., for an injunction as prayed in the bill now on file in said entitled cause; with a copy of which bill and affidavit of the absence of the circuit judge, you are herewith served; at which time and place you can appear and resist said application if you see fit to do so.

Dated, etc.

E F,

Solicitor for complainant.

An affidavit to be used in a case should be entitled in the court and cause, and should contain all the names of the parties complainants and defendants to the suit.¹

No. 244. Order for injunction by circuit judge.

(*Venue, and title of cause as in No. 240, ante, page 610.*)

Due notice of the time and place of the hearing of application for an injunction having been given the defendants herein, upon the reading of the bill of complaint and the accompanying affidavits, it is ordered that a writ of injunction issue in the above entitled cause, as prayed in said bill, upon the complainant giving a bond to the defendants in the sum of —— dollars, with sureties to be approved by the undersigned; conditioned that the complainant will pay to the defendants such damages as they may sustain by reason of the injunction if the court shall eventually decide that the complainant was not equitably entitled to such injunction.

O P, Judge.

No. 245. Order for injunction by commissioner.

(*Venue, and title of cause as in No., 240, ante page 610.*)

It appearing to the undersigned, circuit court commissioner, that the honorable O P, judge of the Circuit Court in and for said county, of, etc.,

¹ *Whipple v. Williams*, 1 Mich. 532; *Arnold v. Nye*, 11 Mich. 456; 115; *King v. Harrington*, 14 Mich. see Law Rule, 37.

is absent from said county, and due notice of the time and place of the hearing of application for an injunction having been given to the defendants, upon the reading of the bill of complaint and the accompanying affidavits, it is ordered that a writ of injunction issue in the above entitled cause, as prayed in said bill, upon the complainant giving a bond to the defendants in the sum of — dollars, with sureties, to be approved by the undersigned, conditioned that the complainant will pay to the defendants such damages as they may sustain by reason of the injunction, if the court shall eventually decide that the complainant was not equitably entitled to such injunction.

L M,
Circuit Court Commissioner.

No second application can be made.—After an application for an injunction has been refused, in whole or in part, or granted conditionally on terms, no second application can be made;¹ and every person making such subsequent application, with knowledge of any previous application and refusal, shall be liable to be punished by fine and imprisonment by the court in which such matter may be pending.²

Indorsement of refusal of injunction.—Any commissioner refusing to grant any order or injunction, shall indorse his refusal upon the application for the order, or bill of complaint, as the case may be.³

No. 246. Indorsement of refusal to grant injunction.

Having examined the within bill, and the affidavit thereto attached, I am of the opinion that the application for an injunction therein prayed should not be granted, and the same is therefore denied.

L M,
Circuit Court Commissioner.

When judges of adjoining circuits may grant injunction.—When any circuit judge and the other officers of any county authorized to grant injunctions, are absent, sick or otherwise disqualified from ordering or allowing an injunction in any case pending, or about to be commenced in such circuit or county, upon due proofs of such facts by affidavit, the circuit judge of any judicial district adjoining the judicial district in which said circuit or county is situated, has authority at chambers, or at any place he may be, to grant or deny such injunction, the

¹ How. Stat. §§ 6609, 7147.

² How. Stat. § 7154.

³ How. Stat. § 7148; see §§ 6096, 6610.

same as if he were the circuit judge of the circuit in which such suit is pending, or about to be commenced, and after the allowance of such injunction, the judge ordering the same has concurrent jurisdiction to modify or dissolve the same with the presiding judge wherein such suit is pending.¹

SECTION VI.

DISSOLUTION.

The granting and continuance of injunctions rest in the discretion of the court; and they will not always be dissolved when the equity of the bill is denied. If by a dissolution the complainant is likely to be deprived of all benefits he might otherwise derive by succeeding in the suit, it will not be dissolved as a matter of course on the coming in of an answer denying the equity of the bill.² On a motion to dissolve an injunction before answer, the allegations in the bill are to be taken as true.³ But without answer or plea the defendant may move to dissolve an injunction for want of equity in the bill, and this in vacation.⁴ And an injunction will be dissolved on motion if it is shown by plea, that there is no equity in the bill.⁵ On a motion to dissolve an injunction before answer, an affidavit is admissible which goes to show that the injunction was irregularly issued, or that the officer allowing it was misled and induced to grant it contrary to law.⁶

Where the equity of a bill is denied by answer the injunction may be dissolved on motion;⁷ but such answer must be positive, full and satisfactory in meeting and denying the equity of the bill, or the injunction will not be dissolved upon it.⁸ Where the bill prays for an injunction, but it is omitted in the prayer for process, it is good ground for refusing the injunction, but not for dissolving it when it has been allowed.⁹

Affidavits will not, as a general rule, be allowed to be sub-

¹ How. Stat. § 6743.

² *Attorney General v. Bank*, Walk. Ch. 90.

³ *Schwarz v. Sears*, Har. Ch. 440.

⁴ *Cooper v. Alden*, Har. Ch. 72.

⁵ *Eldred v. Camp*, Har. Ch. 162; *Gardt v. Brown*, 113 Ill. 475.

⁶ *Carroll v. Bank*, Har. Ch. 197.

⁷ *Eldred v. Camp*, *supra*.

⁸ *Attorney General v. Bank*, *supra*.

⁹ *Taylor v. Snyder*, Walk. Ch. 490.

stituted for an answer for the purpose of the motion to dissolve, except in case of waste or irreparable mischief, and partnership suits.¹ An interlocutory order dissolving an injunction against obtaining possession does not adjudicate the right of possession when that is in issue, so as to anticipate the final decree.²

Where a complainant has due notice of a motion to dissolve an injunction, and neglects to appear and oppose the motion, the defendant may be permitted to take an order dissolving the injunction with costs.³

No. 247. Notice of motion to dissolve injunction.

(*Venue, and title of cause as in No. 204, ante, page 510.*)

To A B, complainant, or E F, his solicitor:

You are hereby notified, that on, etc., at the coming in of said court on said day, or as soon thereafter as counsel can be heard, the defendant will move the court to dissolve the injunction heretofore granted in said cause. Which said motion will be based upon the pleadings in said cause now on file in said court, and the affidavits of the defendant and P Q, this day filed in said cause; with copies of which said motion and affidavits you are also herewith served.

Dated, etc.

P T.

Solicitor for defendant.

No. 248. Motion to dissolve injunction.

(*Venue, and title of cause as in No. 204, ante, page 510.*)

And now comes the defendant, C D, by P T, his solicitor, and moves the court to dissolve the injunction heretofore granted and issued in said cause; and for grounds of said motion shows to the court here, the following, that is to say:

1. There is no equity on the face of said bill.
2. All the material allegations of said bill are denied by the answer of the defendant, and the affidavits filed therewith.
3. Other reasons.

By reason whereof the defendant prays the court that said injunction be dissolved.

P T,

Solicitor for defendant.

(The defendant can omit either of the reasons above given, or insert others as he may deem proper.⁴)

¹ *Sacket v. Hill*, 2 Mich. 182; *Wangelin v. Goe*, 50 Ill. 459; *Ladd v. Flynn*, 90 Mich. 187.

² *Ramsdell v. Maxwell*, 32 Mich. 285.

³ *Kellogg v. Barnes*, Har. Ch. 258.

⁴ *Caslin v. Camp*, 26 Mich. 391; *Lathrop v. Hicks*, 2 Doug. 223.

No. 249. Order dissolving injunction.

(Caption as in No. 204, ante, page 510.)

This cause having come on to be heard upon the motion of the defendant to dissolve the injunction heretofore granted in this cause, and the court having heard read the pleadings and proofs offered upon said motion, and the same having been argued by counsel for the respective parties, and the court having duly considered the same, and being fully advised in the premises, doth order and adjudge that the said injunction be and the same is hereby dissolved, with costs to be taxed against the complainant.

To the order dissolving the injunction may be added a reference to the circuit court commissioner to ascertain and report to the court the damages sustained by reason of the wrongfulting out of the injunction.¹

When may be reviewed by mandamus.—*Mandamus* will lie to review the action of a circuit judge in granting a preliminary injunction and in refusing to dissolve the same, when the return shows the question in dispute to be one of law merely.²

Where an injunction is an abuse of discretion it may in an urgent case be dissolved by *mandamus*.³

¹ See Chancery Rule 21, *post*.

³ *Detroit v. Wayne Judge*, 79

² *Ins. Co. v. Davis*, 100 Mich. 606. Mich. 384.

CHAPTER XLVI.

PROCEEDINGS BY AND AGAINST INFANTS.

- Section 1. SUITS FOR.
2. SUITS AGAINST.
3. SALE OF REAL ESTATE OF INFANTS AND
INCOMPETENT PERSONS.

SECTION I.

SUITS FOR.

It is provided by the statute that when an infant shall have a right of action to recover any real property or the possession thereof, or to recover any debt or damages, he shall be entitled to maintain a suit thereon; and the same shall not be delayed or deferred on account of the infant not being of full age.¹

Next friend.—Before any process can issue in the name of an infant, a competent and responsible person must be appointed to appear in the suit as the next friend of the infant who shall be responsible for the costs thereof.² If a bill is filed without the appointment of a next friend, the suit may be dismissed with costs against the solicitor.³

How appointed.—On the petition of the infant, or, if he is too young to make such petition, then on the petition of some relative or friend,⁴ with the written consent of the person proposed for next friend, such written consent being duly acknowledged or proven before the officer making the appointment, a next friend may be appointed by a circuit judge, or circuit court commissioner.⁵ The petition should not be entitled in any suit.

¹ How. Stat. § 8123; *Sick v. Mich. Aid Ass.*, 49 Mich. 50; see *Crittenden v. Canfield*, 87 Mich. 152.

² How. Stat. § 8124; *Osborn v. Farr*, 42 Mich. 134.

³ 2 Dar. Ch. Pr. 68; see *Kearney v. Doyle*, 22 Mich. 294.

⁴ *Matter of Fritz*, 2 Paige, 374; see *McDonald v. Weir*, 76 Mich. 243; *In re Stockman*, 71 Mich. 180.

⁵ How. Stat. § 8125; *Haines v. Oatman*, 2 Doug. 430.

No. 250. Petition for appointment of next friend.

STATE OF MICHIGAN.

The Circuit Court of the County of ———. In Chancery.

In the matter of the
 appointment of a
 next friend for A }
 B, an infant. }

To the Hon. A J M,

Circuit Judge.

The petition of A B, an infant under the age of twenty-one years, to wit, of the age of *nineteen* years, a resident of the township of —, in said county, respectfully shows unto your honor that a suit is about to be brought in this court, by and on behalf of your petitioner (*and others*), against C D. Your petitioner therefore prays that G M B, of the —, of —, in said State, may, by an order of this court, be appointed the next friend of your petitioner, to appear for him as such in said suit. And your petitioner will ever pray, etc.

A B.

C S M,

Solicitor for petitioner.

STATE OF MICHIGAN, }
 County of ———. } ss.

On this — day of —, A. D. 18—, personally appeared before me, a notary public in and for said county, the above named petitioner, who made oath that he has heard read the foregoing petition by him subscribed, and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated to be on his information and belief, and as to those matters he believes it to be true.

J M E,

Notary Public, — County, Mich.

No. 251. Consent to become next friend.

I hereby consent to be appointed the next friend of the within named petitioner, and to appear for him as such, in the suit named in the within petition.

G M B.

Dated, etc.

No. 252. Acknowledgment of consent.

STATE OF MICHIGAN, }
 County of ———. } ss.

¶ On this — day of —, A. D. 18—, before me, the subscriber, a notary public in and for said county, personally appeared G M B, to me known to be the same person who signed the foregoing consent to become next friend for C D, an infant, and acknowledged that he signed and executed the same, and for the purposes therein stated.

E M I,

Notary Public, — County, Mich.

Upon the foregoing petition, consent and acknowledgment being presented to the judge, he will make the necessary order appointing the next friend.

No. 253. Order appointing next friend.

STATE OF MICHIGAN.

The Circuit Court for the County of ——. In Chancery.

In the matter of the
petition for a next
friend
for
A B, an infant.

Upon reading the petition of A B, an infant, praying for the appointment of G M B as his next friend, in a suit about to be brought by him, the said A B, against C D, and the written consent and acknowledgment of said G M B, it is ordered that the said G M B be, and he is hereby appointed the next friend of said A B, to appear for him as such, in the suit referred to in said petition, upon his executing a bond to said A B, in the penal sum of — dollars, with two sufficient sureties, conditioned that he will duly account to such infant for all money that may be recovered in said suit.

A J M,
Circuit Judge.

The order appointing a next friend must be filed in the office of the register of the court, before any bill of complaint can be filed in the cause.¹

Bond of next friend.—Before any person will be appointed next friend for an infant to recover any debt or damages, he must, if required by the officer to whom the application for such appointment shall be made, execute a bond to such infant, in a penalty at least double the amount claimed in such suit, with such sureties as shall be approved by such officer, conditioned that such next friend shall duly account to such infant for all money which may be recovered in such suit.² Such bond must be delivered to such officer before such appointment is made, and must be by him filed in the office of the judge of probate of the county in which such infant resides; and such officer will be entitled to receive from such next friend the fee allowed by law to such judge of probate for filing such bond, to be paid by him.³

No guardian *ad litem* for an infant defendant, or next friend of an infant complainant, unless he has given security to the infant according to law, shall, as such guardian, receive any money or property belonging to such infant, or which may be

¹ How. Stat. § 8129.² Comp. L. 1871, § 6535; How. Stat.³ How. Stat. § 8127; *Sheahan v.* § 8128.*Circuit Judge*, 46 Mich. 69; see*Schaale v. Wasey*, 70 Mich. 414.

awarded to him in the suit, except such costs and expenses as may be allowed by the court to the guardian out of the fund, or received by the infant in the suit. Neither shall the general guardian of an infant receive any part of the proceeds of the sale of real property belonging to such infant, sold under a decree or order of the court, until the guardian has given such further security for the faithful discharge of his trust as the court may direct.¹

Courts of equity always view with special favor, and guard with jealous care, the rights of infants.²

The court, before giving up control of a fund belonging to infant litigants, should see that the rights of their guardian *ad litem* and his solicitor are secured.³

In a chancery order affecting the rights of infants, where to bind them, it was necessary to procure such order, and where nothing more has been done by them, or on their behalf, than to present to the court such facts as show their rights in the matter, costs should not be awarded against them.⁴

SECTION II.

SUITS AGAINST.

After the issuing and service of process against any infant defendant, the suit shall not be any further prosecuted, until a guardian for such infant shall have been appointed.⁵

Such appointment shall be made upon the request of such defendant, and upon the written consent of any competent person proposed as guardian, by the court, or any circuit judge, or any circuit court commissioner for the county.⁶

If such infant defendant neglect, for twenty days after the return day of the process, by which the suit was commenced, to procure the appointment of a guardian to defend the suit, the plaintiff may obtain an order from any judge or officer of the court mentioned in the preceding section, requiring such

¹ Chancery Rule 33; *Westbrook v. Comstock*. Walk. Ch. 314.

² *Langdon v. Clayson*, 75 Mich. 204; *Axtell's Petition*, 95 Mich. 244.

³ *Sheahan v. Circuit Judge*, 42 Mich. 69.

⁴ *Smith v. Smith*, 13 Mich. 258.

⁵ How. Stat. § 8130; see *Damouth v. Klock*, 29 Mich. 290.

⁶ How. Stat. § 8131; see *Walker v. Hull*, 35 Mich. 488; *Peck v. Adsit*, 98 Mich. 639.

infant to procure the appointment of a guardian within ten days after the service of such order.¹

If a guardian be not appointed within the time specified in such order, the judge or officer granting the same shall appoint some discreet person to be guardian for such infant, in the defense of such suit.²

No person appointed guardian for the purpose of defending a suit against an infant, shall be liable for the costs of such suit, unless specially charged by the order of the court for some personal misconduct in such cause.³

After the guardian is appointed, he causes his appearance to be entered. He must conscientiously and vigorously defend the infant's case. We have hitherto more fully considered this subject.⁴

Infants when sued are to be defended by guardians *ad litem* and not by a general guardian.⁵

In foreclosure suits, general guardians do not represent their wards, and the solicitors of such guardians can not bind the infants. Nor can guardians *ad litem* bind them except in strict accordance with the rules for their protection.⁶ The guardian *ad litem*, in a foreclosure suit should file a separate answer, and not join with other defendants.⁷

Fraud is not inferable from the fact that in a foreclosure suit against an infant defendant, its step-mother, who was a sister of complainant, acts as its guardian *ad litem*.⁸

No. 254. Petition by infant for appointment of guardian ad litem.

(Title of court and cause.)

To the Circuit Court for the County of ——. In Chancery.

The petition of C D, of the township of —, in the county of —, and State aforesaid, the (or a) defendant in this suit, respectfully sheweth that * your petitioner is an infant under the age of twenty-one years, to wit, of the age of — years. That the bill of complaint in said cause was filed against your petitioner (and others), for (here state the purpose for which

¹ How. Stat. § 8132; see *Thayer v. Lane*, Walk. Ch. 202.

² How. Stat. § 8133.

³ How. Stat. § 8134; see *Burt v. McBain*, 29 Mich. 260.

⁴ *Ante*, page 110.

⁵ *Bearinger v. Pelton*, 78 Mich. 109; *Prince v. Clark*, 81 Mich. 167.

⁶ *Sheahan v. Circuit Judge*, 42 Mich. 69.

⁷ *Wood v. Truax*, 39 Mich. 628; *Claxton v. Claxton*, 56 Mich. 557; *Cooper v. Mayhew*, 40 Mich. 528.

⁸ *Hoffman v. Richards*, 98 Mich. 493.

the bill is filed and the substance of the prayer.) And your petitioner shows (*here state how the rights of the infant are affected by the suit*), and that your petitioner has been served with a subpoena in said cause, requiring him to appear and answer the said bill, returnable on the — day of — instant.

Your petitioner therefore prays that T F G, the register of this court, residing in the city of —, in said State, may be appointed the guardian *ad litem* of your petitioner, to appear and defend this suit on her behalf. And your petitioner will ever pray, etc. C D.

O T T,

Solicitor for petitioner.

Consent of guardian.

I hereby consent to become guardian *ad litem* of the above petitioner in the above entitled cause.

Dated, etc.

T F G.

No. 255. Affidavit of infant's signature.

(*Title of court and cause.*)

— County, ss.

W M, of said county, being duly sworn, deposes and says that on the — day of —, A. D. 18—, he saw the above named C D, to him personally known, sign the petition hereto annexed; and that on the — day of —, he also saw T F G, to him personally known, sign the consent to act as guardian *ad litem* thereunder written. W M.

Subscribed, etc.

No. 256. Order appointing guardian ad litem, on petition of infant.

(*Title of court and caption as in 97 ante, page 179.*)

On reading and filing the petition of C D, the defendant in this suit, praying for the appointment of T F G, the register of this court, as guardian *ad litem* for the said C D, who is an infant of the age of — years, together with the consent of T F G to act as such guardian *ad litem*. On motion of O T T, Esq., solicitor and of counsel for the defendant, it is ordered that the said T F G be and he is hereby appointed guardian *ad litem* of the said C D, to appear and defend this suit in his behalf.

A J M,
Circuit Judge.

No. 257. Petition of complainant for the appointment of a guardian ad litem.

(*Title of court and cause.*)

To the Circuit Court for the County of —. In Chancery.

1. The petition of A B, the complainant in this suit, sheweth unto the court, that the bill in this suit was filed against the defendant for the purpose (*here state the purpose of the bill and the manner in which the rights of the infant are affected thereby*).

2. And your petitioner further shows that the said C D resides in the city of — in said State, and is, as your petitioner is informed and believes,

an infant under the age of twenty-one years, to wit, of the age of — years.

3. That upon the — day of — a subpoena in this cause was duly served on the said C D, requiring him to appear and answer said bill, returnable on the — day of — last. (*)

4. And your petitioner further shows that although more than twenty days have elapsed since the return day mentioned in said subpoena, no guardian *ad litem* hath as yet been appointed for such infant, or applied for by him, or by any person on his behalf, to the knowledge or belief of your petitioner.

Your petitioner therefore prays that T F G, the register of this court, may be appointed guardian *ad litem* of such infant defendant, to appear and defend this suit in his behalf. And your petitioner will ever pray, etc.

F K,

A B.

Solicitor for petitioner.

STATE OF MICHIGAN, } ss.
County of ———. }

On this — day of —, A. D. 18—, personally appeared before me, a notary public in and for said county, the above named petitioner, who made oath that he has heard read (*or read*) the foregoing petition, by him subscribed, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be on information and belief, and as to those matters he believes it to be true.

H C B,

Notary Public, — County, Mich.

No. 258. Order for appointment of guardian ad litem on petition of complainant.

(Caption, etc., as in 97 ante, page 179.)

On reading and filing the petition of the complainant in the above cause, showing that the defendant, C D, is an infant, of the age of — years, and that a subpoena to appear and answer in this cause, returnable on the — day of —, A. D. 18—, has been duly served on the said C D, and that although more than twenty days have elapsed since the return day of said subpoena, yet no guardian *ad litem* hath been appointed for such infant, or applied for by him or by any other person on his behalf; and praying for the appointment of T G, the register of this court, as such guardian *ad litem*, to appear and defend this suit in his behalf, on motion of F K, solicitor and counsel for the complainant, it is ordered that the said T G be appointed such guardian *ad litem* unless the said C D shall within ten days after service of a certified copy of this order himself procure a guardian *ad litem* to be appointed.

No. 259. Order making the last order absolute.

(Caption, etc., as in 97 ante, page 179.)

An order having been made in this cause on the — day of —, appointing T F G, the register of this court, guardian *ad litem* of the defendant C D, unless the said C D should, within ten days after the service of a certified copy of said order, himself procure a guardian *ad litem* to be appointed; on

reading and filing an affidavit of W A L, proving the service of a certified copy of such order on the said C D personally, on the — day of —, A. D. 18—, and on reading and filing the affidavit of F K, complainant's solicitor, showing that more than ten days have elapsed since the service of the certified copy of said order on said C D, yet he has received no notice of the appointment of a guardian *ad litem* for such infant defendant, on motion of F K, Esq., solicitor and of counsel for complainant, it is ordered that the said order be and the same is hereby made absolute.

No. 260. Petition by a relative of an infant for appointment of guardian ad litem.

(Title of court and cause, and then proceed as in No. 255, merely changing the name of the petitioner, and stating his relationship to the infant down to the asterisk, () then conclude :)*

Your petitioner, therefore, prays that he may be appointed guardian *ad litem* of such infant defendant, to appear and defend this suit in his behalf. Your petitioner further shows that he has no interest in this suit adverse to that of the infant, and is not connected in business with the solicitor or counsel of the complainant.

(Signature.)

(Jurat as in No. 255.)

The foregoing is the proper form of petition when the person applying to be appointed is the general guardian of the infant. If the petition by a relative of the infant prays for the appointment of a solicitor or master, etc., as guardian *ad litem*, the person proposed should make an affidavit, to be annexed to the petition, that he has no interest adverse to that of the infant, and that he is not connected in business with the complainant's solicitor or counsel.

SECTION III.

SALE OF ESTATE OF INFANTS AND INCOMPETENT PERSONS.

The statute provides that "Any infant, idiot, lunatic, or other incompetent person, seized of any real estate or of any interest therein, either in fee or as tenant for life or years, may apply to the Circuit Court in chancery for the county where the property may be situated, if the infant, idiot, lunatic, or other incompetent be not a resident of this State, and if a resident of this State, then to the Circuit Court in chancery of the county in which he may be a resident, for the sale or disposition of such property,

in the manner hereinafter directed. If the applicant has a guardian, then the application shall be made by such guardian, and if he has no guardian, or the guardian is a non-resident, application may be made by a next friend, who may be authorized to act as such by said court: *Provided*, that if the application be by an idiot, lunatic, or other incompetent, his next friend shall be appointed, on the petition of the person or persons having the custody of the person of such idiot, lunatic or other incompetent, and if the application be made by an infant, the appointment of such next friend shall be made on his petition; but the court, before authorizing a next friend to act for him, shall require proof that his guardian, if he have one, or his parents, or other near relatives if he have no parents, have knowledge of the intention to make such application, and unless it shall appear that such persons have knowledge of such intention, may direct notice of the application to be given to such guardian, parents or other relatives.”¹

The guardian must give a bond to such infant or incompetent person in such penalty, with such sureties and in such form as the court shall direct, conditioned for the faithful performance of the trust reposed, for the paying over, investing and accounting for all moneys that shall be received by such guardian according to the order of any court having authority to give directions in the premises, and for the observance of the orders of the court in relation to the said trust.²

Whenever it shall appear satisfactorily that a disposition of any part of the real estate of such infant, idiot, lunatic, or other incompetent person, or of his interest in any term of years, is necessary and proper, either for the support and maintenance of such infant, idiot, lunatic, or other incompetent person, or for his education, or that the interest of such infant, idiot, lunatic, or other incompetent person requires, or will be substantially promoted by such disposition, on account of any part of his said property being exposed to waste or dilapidation, or on account of its being wholly unproductive, or for any other peculiar reasons or circumstances, the court may order the letting for a term of years, the sale, or other

¹ Haw. Stat. § 6719.

² How. Stat. § 6721; Chancery Rule 33; *Westbrook v. Comstock*,

Walk. Ch. 314; *Sheahan v. W. Circuit Judge*, 42 Mich. 69.

disposition of such real estate or interest, to be made by the guardians of such infants, idiots, lunatics, or other incompetent persons, in such manner and with such restrictions as shall be deemed expedient.¹

But no real estate or term for years shall be sold, leased, or disposed of in any manner against the provisions of any last will, or of any conveyance, by which such estate or term was devised or granted to such infant, idiot, lunatic, or other incompetent person.²

Proceedings.—The application under the statute should be, by sworn petition, addressed to the court, setting forth the name and age of the infant and his residence, the name and residence of the proposed guardian, and his relationship to the infant, the description, situation, value and income of the real estate, and the facts and circumstances which render the sale proper. The court may refer the application to a commissioner to ascertain the truth of the facts stated in the petition, whether a sale would be beneficial to the infant, the value of the property, by lot and parcel, the terms and conditions of the sale, and whether the infant needs the proceeds for his support. Witnesses must be examined to sustain the petition. If any person entitled to dower in the premises is willing to join in the sale, the value of the dower should be ascertained.³

If no reference is made, the court must make the same inquiries.

Upon the coming in of the commissioner's report, if he reports in favor of a sale, the court, if there is no valid objection, will make an order authorizing the guardian to contract for a sale of the premises.

Upon an agreement for a sale, leasing or other disposition of such property being made in pursuance of the order of the court, the same shall be reported to the court upon the oath of the guardian making the same; and if it be confirmed, a lease or conveyance shall be executed under the direction of the court.⁴

All sales, leases, dispositions and conveyances made in good

¹ How. Stat. § 6724; see *Wolscheid v. Bergrath*, 46 Mich. 46.

² How. Stat. § 6726.

³ *Matter of Lansing*, 3 Paige, 265; How. Stat. § 6731.

⁴ How. Stat. § 6727.

faith by the guardian in pursuance of such order, when so confirmed, shall be valid and effectual, as if made by such infant, idiot, lunatic, or other incompetent person when of lawful age and of sound mind.¹

Proceeds of sale, how applied.—From the time of such application to the court, the infant, idiot, lunatic, or other incompetent person, shall be considered as a ward of the court, so far as relates to such property, its proceeds and income; and the court shall make orders for the application and disposition of the proceeds of such property and for the investment of the surplus belonging to such infant, idiot, lunatic, or other incompetent person, so as to secure the same for his benefit, and shall direct a return of such investment and disposition to be made on oath, as soon as may be, and shall require accounts to be rendered periodically, by any guardian or other person who may be entrusted with the disposition of the income of such proceeds.²

No sale made as aforesaid of the real estate of any infant, idiot, lunatic, or other incompetent person, shall give to such infant, idiot, lunatic, or other incompetent person, any other or greater interest or estate in the proceeds of such sale than he had in the estate so sold; but the said proceeds shall be deemed real estate of the same nature as the property sold.³

Dower, how satisfied.—If the real estate of any infant, idiot, lunatic, or other incompetent person, or any part of it, shall be subject to dower, and the person entitled to such dower shall consent in writing to accept a gross sum in lieu thereof, or the permanent investment of a reasonable sum, in such manner as that the interest thereof be made payable to the person entitled to such dower, during life, the court may direct the payment of such sum in gross, or the investment of such sum as shall be deemed reasonable and shall be acceptable to the person entitled to such dower, in manner aforesaid; which sum so paid or invested shall be taken out of the proceeds of the sale of the real estate of such infant, idiot, lunatic, or other incompetent person.⁴

But before any such sum shall be paid, or such investment

¹ How. Stat. § 6728.

² How. Stat. § 6729. see *Forman*
v. *Marsh*, 11 N. Y. 544.

³ Comp. L. 1871, § 5177; How. Stat.
§ 6730.

⁴ How. Stat. § 6731.

made, the court must be satisfied that an effectual release of such right of dower has been executed.¹

It is also provided by statute that whenever it shall be made to appear to the court that it will be manifestly for the interest and advantage of any infant or infants that any incumbrance upon the real estate of such infants should be purchased and discharged, in whole or in part, the court may authorize the guardian of such infants to purchase and discharge the same, and, if necessary, to sell and dispose of such part of the real estate of such infants as may be necessary for that purpose. *Provided*, such purchase and discharge shall in no way be construed as vesting in said guardian any right, title or interest in such premises, to the prejudice of such infants.²

Guardian's final report.—After the completion of the sale, the payment of the purchase money and the delivery of the deed to the purchasers, the guardian makes a final and full report to the court of his actings and doings, his receipts and expenditures, and the disposition of the balance of the money.

General guardians, how appointed.—Except where a parent appoints a testamentary guardian, general guardians are appointed by the Probate Court.³ General guardians represent their wards in partition cases.⁴

Partition of lands of infants.—Where partition of lands in which an infant has an interest is prayed for, nothing can be established by admissions or stipulations. The facts must be inquired into as fully when the infant is a complainant as when he is a defendant.⁵

Proceedings for dower.—In a proceeding by a widow for the assignment of her dower, she, as legal guardian, can not appear for the minor heirs, her interests being antagonistic to theirs; nor could they appear for themselves, nor appoint an attorney to appear for them; and where no proper guardian has been appointed the proceedings are void.⁶

¹ How. Stat. § 6732.

² How. Stat. § 6725; see *Wolscheid v. Bergrath*, 46 Mich. 46, 48.

³ How. Stat. § 6311; *Taff v. Hosmer*, 14 Mich. 255, 259.

⁴ How. Stat. §§ 7862, 7863, 7921, 7925.

⁵ *Claxton v. Claxton*, 56 Mich. 557; *Smith v. Smith*, 13 Mich. 258; see *ante*, pages 428, 446.

⁶ *King v. Merritt*, 67 Mich. 195; *Prince v. Clark*, 81 Mich. 167.

CHAPTER XLVII.

PROCEEDINGS AGAINST CORPORATIONS.

- Section 1. BY SHAREHOLDERS.
2. BY ATTORNEY-GENERAL.
3. JURISDICTION OVER OFFICERS.
4. PROCEEDINGS AGAINST INSOLVENT CORPORATIONS.
5. VOLUNTARY DISSOLUTION OF CORPORATIONS.

SECTION I.

PROCEEDINGS BY A SINGLE SHAREHOLDER.

The aid of the court of chancery is frequently invoked in matters relative to and concerning corporations. In addition to a few general suggestions, we can do no more at the present time, with the limited space at our command, than to call attention to the provisions of our statutes.

Under certain circumstances, equity will relieve a single shareholder in a corporation. If the directors of a corporation are guilty of a breach of trust, injurious to the corporate property, or to the rights of the shareholders, or a portion of them, and if the corporation refuses to institute the proper proceedings to restrain or redress such injury, one or more of the shareholders may institute a suit in their individual names.¹ The failure or refusal of the corporation itself to demand redress, is a condition precedent to the right of a

¹Thompson on Liability of Officers of Corporations, 385; *Hodges v. New England Screw Co.*, 1 R. I. 312, and 3 R. I. 9; *Dodge v. Woolsey*, 18 How. 331; *Robinson v. Smith*, 3 Paige, 222; *Peabody v. Flint*, 6 Allen, 52; *Brown v. Van Dyke*, 8 N. J. Eq. 795; *R. Co. v. R. Co.*, 54 Me. 173, 181; *Colquitt v. Howard*, 11 Ga. 556;

Forbes v. Whitlock, 3 Edw. Ch. 446; *Greaves v. Gouge*, 69 N. Y. 154; *Butts v. Wood*, 37 N. Y. 317; *Hazard v. Durant*, 11 R. I. 195; *Salomons v. Laing*, 12 Beav. 339; *Gregory v. Pachett*, 33 Beav. 595; *Ryan v. R. Co.*, 51 Kan. 365; *Miner v. Ice Co.*, 93 Mich. 112; *Detroit v. Dean*, 106 U. S. 537.

shareholder to sue or appear as plaintiff.¹ The complaint should aver that the corporation, on request, has refused to bring the proper action, otherwise it is demurrable. But this rule does not obtain where the other allegations of the bill show that such a request would have been useless.² The corporation itself must be made a party to the proceeding, either as complainant or defendant.³

Equity has power to wind up at the instance of a single stockholder a corporation, the affairs of which are managed so as to prevent dividends, and to contribute solely to the personal profit of one who owns a majority of the stock and who controls the directorate.⁴

Before the jurisdiction of the court of equity can be invoked by a shareholder, in cases not governed by statute, three things must concur: 1. The matter complained of must be a breach of duty on the part of the directors.⁵ 2. The corporation must fail or refuse to demand redress. 3. There must be an injury to the stockholder.

Unless thereto empowered by statute, a court of equity has no jurisdiction either to remove the officers of a corporation,⁶ or to put an end to the corporation itself,⁷ or wind up its affairs,⁸ though it may, in the event of its insolvency, take possession of its assets, and distribute them among its creditors.

SECTION II.

BY ATTORNEY-GENERAL.

Upon a bill being filed under the direction of the attorney-general, in any court having equity jurisdiction, the court

¹ *K. R. Co. v. Portland*, 54 Me. 173; see Thompson on Liability of Officers of Corporations, 385.

² *Miner v. Ice Co.*, 93 Mich. 112.

³ See Thompson on Liability of Officers of Corporations, 385, 393, for a full discussion of this subject.

⁴ *Miner v. Ice Co.*, 93 Mich. 97.

⁵ *Dodge v. Woolsey*, 18 How. 369.

⁶ *Atty.-gen'l v. Earl of Clarendon*, 17 Ves. 491; *Bayless v. Orne*, 1

Freem. Ch. 171; *Neall v. Hill*, 16 Cal. 145.

⁷ *Atty.-gen'l v. Utica Ins. Co.*, 2 Johns. Ch. 371; *Atty.-gen'l v. Bank*, 1 Hopk. Ch. 354; *Slee v. Bloom*, 5 Johns. Ch. 366; *Stamm v. Ins. Co.*, 65 Mich. 317; *Tripp v. R. Co.*, 66 Mich. 1; *Heap v. Mfg. Co.*, 97 Mich. 147.

⁸ *Neall v. Hill*, 16 Cal. 145; *Verplanck v. Ins. Co.*, 1 Edw. Ch. 84; *Miner v. Ice Co.*, 93 Mich. 112.

has power to restrain by injunction, any corporation from assuming or exercising any franchise, liberty or privilege, or transacting any business not authorized by the charter of such corporation; and in the same manner to restrain any individuals from exercising any corporate rights, privileges or franchises, not granted to them by any law of this State.¹

Such injunction may be issued before the coming in of the answer, upon satisfactory proof that the defendants complained of, have usurped, exercised or claimed, any franchise, privilege, liberty or corporate right not granted to them, and after the coming in of the answer, such injunction may be continued until judgment at law shall have been had.²

Whether a corporation is exercising a franchise or a right without legislative authority is a question to be inquired into by the State, and can not be raised by a private person irrespective of an injury to his rights.³

A charter can only be forfeited by direct proceedings on the part of the attorney-general.⁴

SECTION III.

JURISDICTION OVER OFFICERS OF CORPORATIONS.

The Circuit Court in chancery within the proper county has jurisdiction over directors, managers, trustees and other officers of corporations, and over any persons who may have held such offices in any corporation provided that proceedings are commenced within one year after they have ceased to be such directors, managers, trustees and other officers.⁵

1. To compel them to account for their official conduct in the management and disposition of the funds and property committed to their charge;

2. To decree and compel payment by them to the corporation whom they represent, and to its creditors, of all sums of money, and of the value of all property which they may have

¹ How. St. § 8148; see *Ry. Co. v. St. Clair Judge*, 31 Mich. 456; *Cady v. Mfg. Co.*, 97 Mich. 147.

² How. St. § 8149.

³ *Potter v. Ry. Co.*, 83 Mich. 285.

⁴ *Gd. Rap. v. Hydraulic Co.*, 66 Mich. 606.

⁵ How. Stat. § 8150; *Ib.* § 8145; *Ry. Co. v. Judge*, 31 Mich. 456; *L. Bank v. City*, 66 Mich. 273.

acquired to themselves, or transferred to others, or may have lost or wasted, by any violation of their duties as such directors, managers, trustees or other officers;

3. To suspend any such trustee or officer from exercising his office, whenever it shall appear that he has abused his trust;

4. To remove any such trustee or officer from his office, upon proof or conviction of gross misconduct;

5. To direct new elections to be held by the body or board duly authorized for that purpose, and to supply any vacancy created by such removal;

6. In case there be no such body or board, or all the members of such board be removed, then to report the same to the governor, who shall be authorized, with the consent of the senate, to fill such vacancies;

7. To set aside all alienations of property made by the trustees or other officers of any corporation, contrary to the provisions of law, or for purposes foreign to the lawful business and objects of such corporation, in cases where the person receiving such alienation knew the purpose for which the same was made; and

8. To restrain and prevent any such alienation in cases where it may be threatened, or there may be good reason to apprehend that it is intended to be made.¹

The jurisdiction above conferred is to be exercised as in ordinary cases, on bill or petition, as the case may require, or as the court may direct, at the instance of the attorney-general, prosecuting in behalf of the people of this State, or at the instance of any creditor of such corporation or at the instance of any director, trustee or other officer of such corporation having a general superintendence of its concerns, or by any stockholder of such corporation.²

When any of the visitorial powers enumerated, over any corporation, are or shall be vested by statute in any corporate body or public officer, the provisions of that section shall not be construed to divest or impair the powers so vested.³

¹ How. Stat. § 8150.

³ How. Stat. § 8151.

² Comp. L. 1871, § 6564; How. Stat. § 8152.

Sequestration of property.—Whenever a judgment at law, or a decree in chancery, shall be obtained against any corporation, incorporated under the laws of this State, and an execution issued thereon shall have been returned unsatisfied in part or in whole, upon the petition of the person obtaining such judgment or decree, or his representatives, the Circuit Court within the proper county may sequester the stock, property, things in action and effects of such corporation, and may appoint a receiver of the same.¹

Upon a final decree on any such petition, the court shall cause a just and fair distribution of the property of such corporation, and of the proceeds thereof, to be made among the fair and honest creditors of such corporation, in proportion to their debts respectively, who shall be paid in the same order as provided in the case of a voluntary dissolution of a corporation.²

The judgment creditor who petitions under the statute gains no advantage over the other creditors, and any interests which they have in the property or equities sought to be reached are not disturbed by the sequestration.³

Surrender of corporate rights.—Whenever any incorporated company shall have remained insolvent for one whole year, or for one year shall have neglected or refused to pay and discharge its notes or other evidences of debt, it shall be deemed to have surrendered the rights, privileges and franchises granted by any act of incorporation, or acquired under the laws of this State, and it shall be adjudged to be dissolved.⁴

This section does not authorize the filing of a bill by a stockholder to compel the winding up of a manufacturing corporation.⁵

¹ How. Stat. § 8153; see *Cook v. R. R. Co.*, 45 Mich. 453; *Miner v. B. Ass.*, 65 Mich. 84; *Grenell v. Ferry*, 68 N. W. Rep. 5; *Iron Works v. Hosmer*, 100 Mich. 124.

² Comp. L. 1871, § 6566; How. Stat. § 8154.

³ *Iron Works v. Hosmer*, 100 Mich. 124.

⁴ How. Stat. § 8155; see *People v. Bank*, 12 Mich. 527; *Montgomery v. Merrill*, 18 Mich. 338; *R. R. Co. v. Woodhull*, 25 Mich. 29; *Bridge Co. v. Prange*, 35 Mich. 406.

⁵ *Heap v. Mfg. Co.*, 97 Mich. 147.

SECTION IV.

PROCEEDINGS AGAINST INSOLVENT CORPORATIONS.

Whenever any corporation having banking powers, or having the power to make loans on pledges or deposits, or authorized by law to make insurances, shall become insolvent or unable to pay its debts, or shall neglect or refuse to pay its notes or evidences of debt on demand, or shall have violated any of the provisions of its act or acts of incorporation, or of any other act binding on such corporation, any court having equity jurisdiction, may, by injunction, restrain such corporation and its officers from exercising any of its corporate rights, privileges or franchises, and from collecting or receiving any debts or demands, and from paying out, or in any way transferring or delivering to any person any of the moneys, property or effects of such corporation, until such court shall otherwise order.¹

Who may apply for injunction.—Such injunction may be issued on the application of the attorney-general in behalf of the people of this State, or on the application of any creditor or stockholder of such corporation, upon bill or petition, filed for that purpose and upon due proof of any of the facts in the last section, required to authorize the same. Whenever such injunction shall issue against any bank for any violation of its charter, on the application of any creditor, the court shall proceed to final decree in such case, and adjudge a forfeiture if the proof is sufficient, notwithstanding such creditor may settle with such corporation, and relinquish his claim against said corporation; and in all such cases the attorney-general, under the direction of the governor, or any creditor, shall have the right to appear and prosecute such suit; and such suit shall not be discontinued if either of them so appear and prosecute such suit to final judgment.²

Appointment of receiver.—Upon such application being made, and in any stage of the proceedings thereupon, the court

¹How. Stat. § 8156; see *Att'y-Gen'l v. Bank*, Walk. Ch. 90, 98; *Att'y-Gen'l v. Bank*, Har. Ch. 194.

²How. Stat. § 8157; *Barnum v. Bank*, Har. Ch. 116; *Fay v. R. R.*, Har. Ch. 194.

may appoint one or more receivers to take charge of the property and effects of such corporation, and to collect, sue for, and recover the debts and demands that may be due, and the property that may belong to such corporation, who shall, in all respects, be subject to the control of the court.¹ Such receivers shall possess all the powers and authority conferred, and be subject to all the obligations and duties imposed upon receivers appointed in case of the voluntary dissolution of a corporation.²

Making stockholders parties.—If such application be made by a creditor of any corporation, whose directors or stockholders are made liable by law for the payment of such debt, in any event or contingency, such directors or stockholders may be made parties to the bill or petition, either on the filing thereof, or in any subsequent stage of the proceedings, whenever it shall become necessary to enforce such liability.³

Making directors parties.—If any creditor of a corporation desire to make such directors or stockholders parties to the suit, after a decree therein against the corporation, he may do so on filing a supplemental bill against them, founded upon such decree, and if such decree was rendered in a proceeding instituted by the attorney-general, such creditor may on his application, be made complainant therein, with or instead of the attorney-general, and may, in like manner, make the directors and stockholders sought to be charged defendants in such suit.⁴

Bill against stockholders.—Whenever any creditor of a corporation shall seek to charge the directors, trustees or other superintending officers of such corporation, or the stockholders thereof, on account of any liability created by law, he may file his bill for that purpose in any court having chancery jurisdiction, which shall possess jurisdiction to enforce such liability.⁵

The court shall proceed thereon as in other cases, and when

¹ How. Stat. § 8158.

² How. Stat. § 8159; 4 Paige, 224;

³ Comstock, 416.

⁴ How. Stat. § 8160; see Thompson on Liability of Stockholders, §§ 353,

357; *Erickson v. Nesmith*, 46 N. H. 371.

⁵ Comp. L. 1871, § 6573; How. Stat. § 8161.

⁶ Comp. L. 1871, § 6574; How. Stat. § 8162.

necessary, shall cause an account to be taken of the property and debts due to and from such corporation, and shall appoint one or more receivers, who shall possess all the powers conferred, and be subject to all the obligations imposed on receivers, in the case of the voluntary dissolution of a corporation.¹

But if, on the coming in of the answer, or upon the taking of any such account, it shall appear that such corporation is insolvent, and that it has no property or effects to satisfy such creditor, the court may proceed, without appointing any receiver, to ascertain the respective liabilities of such directors and stockholders, and enforce the same by its decree, as in other cases.²

Upon a final decree being made upon any such application to restrain a corporation, or upon any such bill filed against the directors or stockholders, the court shall cause a just and fair distribution of the property of such corporation, and of the proceeds thereof, to be made among its fair and honest creditors, in the order and in the proportions prescribed in the case of voluntary dissolution of a corporation.³

In all cases in which the directors or other officers of a corporation, or the stockholders thereof, shall have been made parties to a suit in which a decree shall be rendered, if the property of such corporation shall be insufficient to discharge its debts, the court shall proceed to compel each stockholder to pay in the amount due and remaining unpaid on the shares of stock held by him, or so much thereof as shall be necessary to satisfy the debts of the company.⁴ If the debts of the company shall remain unsatisfied, the court shall proceed to ascertain the respective liabilities of the directors or other officers, and of the stockholders, and to decree the amount payable by each, and enforce such decree as in other cases.⁵

Discovery by corporation.—Upon any application to the court having jurisdiction, in any of the cases provided, chapter 281, H. S., such court may compel such corporation to discover

¹ Comp. L. 1871, § 6575; How. Stat. § 8163.

² Comp. L. 1871, § 6576; How. Stat. § 8164.

³ Comp. L. 1871, § 6577; How. Stat. § 8165.

⁴ See *Brewer v. Salt Ass.*, 58 Mich. 351; How. Stat. § 8166.

⁵ Comp. L. 1871, § 6579; How. Stat. § 8167; see *Chubb v. Upton*, 95 U. S. 665.

any stock, property, things in action or effects alleged to belong, or to have belonged to it, the transfer and disposition thereof, and the consideration, and all the circumstances of such disposition.¹

Discovery by officers.—Every officer, agent or stockholder of any corporation against which proceedings shall be instituted according to the provisions of said chapter, and every person to whom it shall be alleged that any transfer of any property or effects of such corporation has been made, or in whose possession or control any such property or effects shall be alleged to be, may be compelled, in the discretion of the court, to answer a bill filed to obtain any discovery in the preceding section specified, notwithstanding such answer may expose the corporation of which he is a member to a forfeiture of its corporate rights, or any of them.²

The answers of the officers and agents of any corporation, shall be evidence against the corporation, in the same manner and to the same extent as if such answers had been given upon an examination of such officers or agents as witnesses in the cause; and such officers or agents may subsequently be examined as witnesses by either party, under the order of the court, but no such answer shall be compelled, unless by special order of the court.³

Neither the answer of any such officer or agent, nor his testimony upon any such subsequent examination, shall be used as evidence upon any indictment, or other criminal prosecution or proceeding against him.⁴

Staying proceedings at law.—Whenever any bill shall be filed, or any application made against any corporation, its directors or other superintending officers, or its stockholders, according to the provisions of this chapter, the court may, by injunction, on the application of either party, and at any stage of the proceedings, restrain all proceedings at law by any creditor against the defendants in such suit; and whenever it shall appear necessary or proper, may order notice to be published in such manner as the court shall direct, requiring all

¹ How. Stat. § 8168; 6 Paige Ch. 231.

² Comp. L. 1871, § 6581; How. Stat. § 8169.

³ Comp. L. 1871, § 6582; How. Stat. § 8170.

⁴ Comp. L. 1871, § 6583; How. Stat. § 8171.

the creditors of such corporation to exhibit their claims and become parties to the suit within a reasonable time, not less than six months from the first publication of such order, and in default thereof, to be precluded from all benefit of the decree which shall be made in such suit, and from any distribution which shall be made under such decree.¹

SECTION V.

VOLUNTARY DISSOLUTION OF CORPORATIONS.

Who may apply for.—Whenever the directors, trustees, or other officers having the management of the concerns of any corporation, or the majority of them, shall discover that the stock, property and effects of such corporation have been so far reduced by losses or otherwise, that it will not be able to pay all just demands to which it may be liable, or to afford a reasonable security to those who may deal with such corporation, or whenever such directors, trustees or officers, or a majority of them, shall, for any reason, deem it beneficial to the stockholders that such corporation should be dissolved, they may apply to any court having equity jurisdiction, by petition, for a decree dissolving such corporation.²

Contents of application.—Every such application shall contain a statement of the reasons which induce the applicants to desire a dissolution of the corporation; and there shall be annexed thereto:

1. A full, just and true inventory of all the estate, both real and personal, in law and equity, of such corporation, and of all the books, vouchers and securities relating thereto;

2. A full, just and true account of the capital stock of such corporation, specifying the names of the stockholders, their residence when known, the number of shares belonging to each, the amount paid in upon such shares respectively, and the amount still due thereon.

3. A statement of all incumbrances on the property of such corporation;

¹ Comp. L. 1871, § 6584; How. Stat. § 8172.

² How. Stat. § 8174; *Cady v. Mfg.*

Co., 48 Mich. 133, 136; *Bewick v. Harbor Co.*, 39 Mich. 700; *Rty. Co. v. Judge*, 31 Mich. 456.

4. A full and true account of all the creditors of such corporation, and of all engagements entered into by such corporation, which may not have been fully satisfied and canceled, specifying the place of residence of each creditor, and of every person to whom such engagements were made, if known, and if not known, the fact to be so stated; the sum owing to each creditor; the nature of each debt or demand; and the true cause and consideration of such indebtedness in each case.¹

Affidavit.—To every such petition shall also be annexed an affidavit of the applicants, that the facts stated in such application, and the accounts, inventories and statements contained therein or annexed thereto, are just and true, so far as the applicants respectively know, or have the means of knowing.²

Order to show cause.—Upon such petition, accounts, inventories and affidavits being filed, an order shall be entered requiring all persons interested in such corporation, to show cause, if any they have, why such corporation should not be dissolved before some circuit court commissioner to be named in such order, at some time and place to be therein specified, not less than three months from the date thereof.³

Publication of notice.—Notice of the contents of such order shall be published once in each week for three weeks successively, in such paper as the court may direct, and in a newspaper published in the county where the principal place of conducting the business of such corporation shall be situated, if any newspaper be published in such county.⁴

Proceedings before commissioner.—On the day appointed in such order, such commissioner shall proceed to hear the allegations and proofs of the parties, and shall take testimony in relation thereto, and shall, with all convenient speed, report the same to the court, with a statement of the property, effects, debts, credits and engagements of such corporation, and of all other matters and things pertaining to such corporation.⁵ Such commissioner shall be entitled to the use of the original

¹ Comp. L. 1871, § 6587; How. Stat. § 8175.

² Comp. L. 1871, § 6588; How. Stat. § 8176.

³ Comp. L. 1871, § 6589; How. Stat. § 8177.

⁴ Comp. L. 1871, § 6590; How. Stat. § 8178.

⁵ Comp. L. 1871, § 6591; How. Stat. §§ 8179, 8180.

petition and schedules annexed thereto, if he require the same by an order on the register of the court, with whom they may be deposited, and shall return the same with his report.

When corporation to be dissolved.—Upon the coming in of the report of the commissioner, if it shall appear to the court that such corporation is insolvent, or that for any reason a dissolution thereof will be beneficial to the stockholders, and not injurious to the public interest, a decree shall be entered dissolving such corporation, and appointing one or more receivers of its estate and effects; and such corporation shall thereupon be dissolved and shall cease.¹

Receivers.—Any of the directors, trustees or other officers of such corporation, or any of its stockholders, may be appointed receivers, who, upon entering upon the duties of their appointment, shall give such security to the people of this State, and in such penalty as the court shall direct, conditioned for the faithful discharge of the duties of their appointment, and for the due accounting for all moneys and effects received by them as such receivers.² Such receivers shall be vested with all the estate, real and personal, of such corporation, from the time of their having filed the security hereinbefore required, and shall be trustees of such estate for the benefit of the creditors of such corporation, and of its stockholders.³ Such receivers shall have all the power and authority conferred by law upon trustees to whom an assignment of the estate of an insolvent debtor may be made.⁴

Receivers to give notice of appointment.—The receivers, immediately on their appointment, shall give notice thereof which shall contain the same matters required by law in notices of trustees of insolvent debtors; and in addition thereto, shall require all persons holding any open or subsisting contract of such corporation, to present the same in writing, and in detail, to such receivers, at the time and place in such notice specified; which shall be published once in each week for six successive weeks in such paper as the court may direct, and in a newspaper printed in the county where the principal place of conduct-

¹ How. Stat. § 8181; see *Kimball v. Goodburn*, 32 Mich. 10; 1 Paige, 258.

² How. Stat. § 8182; *Covert v. Rogers*, 38 Mich. 368.

³ Comp. L. 1871, § 6594; How. Stat. § 8183.

⁴ How. Stat. § 8184; see *Whitaker v. Grummond*, 68 Mich. 249.

ing the business of such corporation shall have been situated, if such newspaper be there published.¹

Receiver to bring suit, etc.—If there shall be any sum remaining due upon any share of stock subscribed in such corporation, the receiver shall immediately proceed and recover the same, unless the person so indebted shall be wholly insolvent; and for that purpose may file his bill in any court having equity jurisdiction, or may commence and prosecute an action at law for the recovery of such sum, without the consent of any creditors of such corporation.²

Certain sales void.—All sales, assignments, transfers, mortgages and conveyances of any part of the estate, real or personal, including things in action, of every such corporation, made after the filing of the petition for a dissolution thereof, in payment of, or as security for, any existing or prior debt, or for any other consideration, and all judgments confessed by such corporation after that time, shall be absolutely void as against the receivers who may be appointed on such petition, and as against the creditors of such corporation.

Debtors to account to receiver.—After the first publication of the notice of the appointment of receivers, every person having possession of any property belonging to such corporation, and every person indebted to such corporation, shall account and answer for the amount of such debt, and for the value of such property, to the said receivers; and all the provisions of law in respect to trustees of insolvent debtors, the collection and preservation of the property of such debtors, the concealment and discovery thereof, and the means of enforcing such discovery, shall be applicable to the receiver so appointed, and to the property of such corporation.³

Referring controversies.—Such receivers shall have the same power to settle any controversy that shall arise between them and any debtors or creditors of such corporation, by a reference, as is given by law to trustees of insolvent debtors, and the same proceedings shall be had for that purpose, and with the like effect; and application may be made to any officer authorized to appoint such referees on the application of the

¹ Comp. L. 1871, § 6598; How. Stat. § 8186.

² Comp. L. 1871, § 6597; How. Stat. § 8185.

³ Comp. L. 1871, § 6600; 4 Paige, 425; How. Stat. § 8188.

trustees of insolvent debtors, who shall proceed therein in the same manner; and the referees shall proceed in like manner and file their report with the like effect in all respects.¹

Calling meetings.—The receivers shall be subject to all the duties and obligations imposed by law on trustees of insolvent debtors, so far as they may be applicable, except where other provisions are herein made, and they shall call a general meeting of the creditors of such corporation within four months from the time of their appointment, when all accounts and demands in favor of and against such corporation, and all its open and existing contracts shall be ascertained and adjusted, as far as may be, and the amount of moneys in the hands of the receivers declared.²

Subsisting contracts.—If there shall be any open and subsisting engagements or contracts of such corporation, which are in the nature of insurances or contingent engagements of any kind, the receivers may, with the consent of the party holding such engagement, cancel and discharge the same by refunding to such party the premium or consideration paid thereon to such corporation, or so much thereof as shall be in the same proportion to the time which shall remain of any risk assumed by such engagement as the whole premium bore to the whole term of such risk; and upon such amount being paid by such receivers to the person holding or being the legal owner of such engagement, it shall be deemed canceled and discharged as against such receivers.³

Receivers' commission.—Such receivers shall, in addition to their actual disbursements, be entitled to such commissions as the court shall allow, not exceeding the sum allowed by law to executors and administrators.⁴

Receiver to retain certain moneys.—The receivers shall retain, out of the moneys in their hands, a sufficient amount to pay the sums which they are hereinbefore authorized to pay for the purpose of canceling and discharging any open or subsisting engagements.⁵

¹ Comp. L. 1871, § 6601; How. Stat. § 8189; *Cady v. Mfg. Co.* 48 Mich. 138.

² Comp. L. 1871, § 6602; How. Stat. § 8190.

³ Comp. L. 1871, § 6603; How. Stat. § 8191.

⁴ Comp. L. 1871, § 6604; How. Stat. § 8192.

⁵ Comp. L. 1871, § 6605; How. Stat. § 8193.

If any suit be pending against the corporation, or against the receivers, for any demand, the receivers may retain the proportion which would belong to such demand, if established, and the necessary costs in their hands, to be applied according to the event of such suit, or to be distributed in a second or other dividend.¹

Order of payment of debts.—The receivers shall distribute the residue of the moneys in their hands among all those who have exhibited their claims as creditors, and whose debts have been ascertained, as follows:

First. All debts entitled to a preference under the laws of the United States;

Second. Executions actually levied against such corporations, to the extent of the property on which they shall respectively be levied, and according to their legal priority;

Third. Creditors having made special deposits, if such deposits remain, in kind;

Fourth. All other creditors of such corporation, in proportion to their respective demands, without giving any preference to debts due on specialties.²

Second dividend.—If the whole of the estate of such corporation be not distributed on the first dividend, the receivers shall, within one year thereafter, and within sixteen months after their appointment, make a second dividend of all the moneys in their hands, among the creditors entitled thereto; of which, and that the same will be a final dividend, notice shall be published once in each week for three weeks successively, in such paper as the court may direct, and in a newspaper printed in the county where the principal place of business of such corporation was situated, if there be such newspaper.³

Proceedings on second dividend.—Such second dividend shall be made in all respects in the same manner as herein prescribed in relation to the first dividend, and no other shall be made thereafter among the creditors of such corporation, unless ordered by the court, except to the creditors having suits against it, or against the receivers, pending at the time of such second dividend, and except of the moneys which

¹ Comp. L. 1871, § 6606; How. Stat. § 8194.

² Comp. L. 1871, § 6607; How. Stat. § 8195.

³ Comp. L. 1871, § 6608; How. Stat. § 8196.

may be retained to pay such creditors; but every creditor who shall have neglected to exhibit his demand before the first dividend, and who shall deliver his account to the receivers before such second dividend, shall receive the sum he would have been entitled to on the first dividend, before any distribution be made to the other creditors.¹

Debts not exhibited.—After such second dividend shall have been made, the receivers shall not be answerable to any creditor of such corporation, or to any person having claims against such corporation, by virtue of any open or subsisting engagement, unless the demand of such creditor shall have been exhibited, and the engagement upon which such claims are founded shall have been presented to the said receivers, in detail and in writing, before or at the time specified by them in their notice of a second dividend.²

Distribution to stockholders.—After a final dividend is made, and the debts of any such corporation are paid, if there shall remain any surplus in the hands of the receivers, they shall distribute the same among the stockholders of such corporation, in proportion to the respective amounts paid by them, severally, on their shares of stock.³

When any suit pending at the time of the final dividend shall be terminated, they shall apply the moneys retained in their hands for that purpose, to the payment of the amount recovered, and their necessary costs and expenses; and if nothing shall have been recovered, they shall distribute such moneys, after deducting their expenses and costs, among the creditors and stockholders of the corporation, in the same manner as herein directed in respect to a second dividend.⁴

Receiver under control of court.—The receivers shall be subject to the control of the court, and may be compelled to account at any time; they may be removed by the court, and any vacancy created by such removal, or by death or otherwise, may be supplied by the court.⁵

Receiver's accounts.—Within three months after the time

¹ Comp. L. 1871, § 6609; How. Stat. § 8197.

² Comp. L. 1871, § 6610; How. Stat. § 8198.

³ Comp. L. 1871, § 6611; How. Stat. § 8199.

⁴ Comp. L. 1871, § 6612; How. Stat. § 8200.

⁵ Comp. L. 1871, § 6613; How. Stat. § 8201.

herein prescribed for making a second dividend, the receivers shall render a full and accurate account of their proceedings to the court, which shall be referred to a commissioner to examine and report thereon.¹ Previous to rendering such account, the receivers shall insert a notice of their intention to present the same, once in each week for three weeks successively, in such paper as the court may direct, and in a newspaper of the county in which notices of dividends are herein required to be published, if there be one, specifying the time and place at which such account will be rendered.²

Duty of commissioner on reference.—The commissioner to whom such account shall be referred, shall hear and examine the proofs, vouchers and documents offered for or against such account, and shall report thereon fully to the court.³

Upon the coming in of such report, the court shall hear the allegations of all concerned therein, and shall allow or disallow such account, and decree the same to be final and conclusive upon all the creditors of such corporation, upon all persons who have claims against it upon any open or subsisting engagements, and upon all the stockholders of such corporation.⁴

Further accounts by receivers.—Such receivers shall also account from time to time, in the same manner and with the like effect, for all moneys which shall come to their hands after the rendering of such account as hereinbefore provided, and for all moneys which shall have been retained by them for any of the purposes hereinbefore specified, and shall pay into court all unclaimed dividends.⁵

Suits not to abate.—The dissolution of a corporation by a decree of the court, or by the expiration of its charter, or otherwise, shall not abate any suit or proceedings in favor of such corporation which shall have been pending at the time of such dissolution; but all such suits or proceedings may be continued by the receivers who shall have been appointed for such corporation by the court or by the trustees on whom the estate and effects of such corporation shall have devolved, in

¹ Comp. L. 1871, § 6614; How. Stat. § 8202.

² Comp. L. 1871, § 6615; How. Stat. § 8203.

³ Comp. L. 1871, § 6616; How. Stat. § 8204.

⁴ Comp. L. 1871, § 6617; How. Stat. § 8205.

⁵ Comp. L. 1871, § 6618; How. Stat. § 8206.

the name of such corporation, or in the names of such receivers or trustees, who may be substituted as plaintiffs under the direction of the court in which the suit shall be pending, and subject to such order as the court may deem expedient, in relation to the payment or security of costs.¹

Whenever a receiver of the property and effects of a corporation has been appointed before its dissolution, or afterward, new suits may be brought and carried on by any such receivers, either in their own names, or in the name of the corporation for which they shall have been appointed.²

No suit commenced in the name of any such receiver, shall be abated by his removal or death; but the same may be continued in the name of the remaining receiver, if there be one, or in the name of the successor of the receiver so removed or deceased, or of the corporation, as may be directed by the court in which the suit may be pending.³

Suits discontinued.—The court in which any suit or proceeding against a corporation which shall have been dissolved by a decree in chancery or otherwise, shall be pending at the time of such dissolution, shall have power, on the application of either party thereto, to make an order for the continuance of such suit or proceeding, and the same may thereafter be continued until a final judgment or decree shall be had therein.⁴

Appeal.—It would seem that no appeal will lie from proceedings under the statute for voluntary dissolution of corporations.⁵

Certain corporations excepted.—The statute provides that the foregoing provisions shall not extend to any incorporated library or lyceum society, to any religious corporation, or any incorporated academy or select school; nor to the proprietors of any burying-ground incorporated under the laws of this State.⁶

¹ Comp. L. 1871, § 6620; How. Stat. § 8208.

² Comp. L. 1871, § 6621; How. Stat. § 8209.

³ Comp. L. 1871, § 6622; How. Stat. § 8210.

⁴ Comp. L. 1871, § 6623; How. Stat.

§ 8211; *Berwick v. Alpena*, 39 Mich. 700.

⁵ See *Cady v. Goods Co.*, 48 Mich. 133, 136; *Verplanck v. Ins. Co.*, 2 Paige, 438; *Rowley v. Van Benthuyssen*, 16 Wend. 369.

⁶ How. Stat. 8173.

CHAPTER XLVIII.

PROCEEDINGS TO BAR DOWER OF INSANE.

- Section 1. WHEN PROPER,
2. PETITION FOR.
3. PROCEEDINGS.

SECTION I.

WHEN PROPER.

By the statute of Michigan, whenever the wife of any person shall have become insane, imbecile or idiotic, or for any cause shall be unable, from defective intellect, to join her husband in the conveyance of real estate, and shall have remained in that condition for more than two years, or when it shall be made to appear to the court that such married woman is incurably insane, she may be barred of her right of dower in the lands of her husband.¹

SECTION II.

PETITION FOR.

The husband or any person interested in any such real estate, may apply to the circuit court in chancery of the county where such lands or any part of such lands are situated, by petition under oath for the appointment of a guardian, and for leave to sell her inchoate right of dower.²

What petition must state.—The petition shall state the name, age and residence of such married woman, and the name, residence and age of her husband as near as can be ascertained.

Second. The nature of the disability of said married woman, and of the length of time it has existed.

¹ How. Stat. § 5762.

² Ib. § 5763.

Third. A full description of the lands and premises in this State, to be affected by such proceedings.

Fourth. The value of each piece of real estate, and the amount of incumbrance upon it (if any), not affected by or prior to her claim of dower.

Fifth. If the real estate is to be sold by the husband, or has been sold by him, the exact amount of the consideration of such sale, as made or agreed upon.

Sixth. The reasons why such sale is desirable to said husband or petitioner.¹

SECTION III.

PROCEEDINGS.

Upon the filing of the petition, the circuit court in chancery shall enter an order that the petition be heard on a certain day, and notice of the hearing be given by publication or otherwise, in such manner and to such persons as said court shall direct.²

Appearance and answer of wife.—At such hearing the said wife may appear in person, or by counsel, or by guardian *ad litem*, appointed as in other cases by said court, and may answer such petition in the time and manner said court may direct, and upon the filing of an answer, the case shall be deemed at issue.³

Taking proofs.—When the case is at issue, or if the wife shall fail to appear, the court may proceed summarily upon oral or written evidence, taken under its order, to hear and determine the case; or, at its discretion, may refer it to a circuit court commissioner, or a special commissioner appointed by the court for the purpose, to take proofs and report the same to the court with his opinion.⁴

Commissioner's report.—The commissioner must report his opinion.

First. As to the insanity or imbecility of the respondent.

Second. As to the propriety or necessity of selling said

¹ How. Stat. § 5763.

² Ib. § 5764.

³ How. Stat. § 5765.

⁴ Ib. § 5765.

real estate, or of barring said respondent's right of dower therein.

Third. The cash value at that time of her dower interest in said premises, taking into consideration the respective ages of the husband and wife.¹

Action on report.—Upon the coming in of the report, the court shall consider the same, and enter such order as shall be just and equitable. If the court shall decide that the respondent is insane, and that it is desirable that the right of dower should be barred, it shall fix the then present value of such dower, and thereafter shall appoint a guardian of such insane person, who shall be some person other than her husband, who shall give bond in a sum to be fixed by the court, with surety or sureties, to be approved by the court, conditioned to receive and invest any moneys that may come into his hands for her sole use and benefit, under the order and direction of the court, both as to its investment, and to the disposition of the income thereof.²

Sale by guardian.—Upon the approval of such bond, said guardian may proceed and sell at private sale, as such guardian, the interest of such married woman in said land, at a sum not less than the value of such dower as fixed by said court. He may join with the husband in such conveyance, or if the husband has previously sold and conveyed such property, may, by separate conveyance, deed said right of dower to the husband's grantee or grantees, his or their heirs and assigns, but to no other person. Said conveyance shall in all cases be as effective to bar the right of dower of said married woman as if she had, being in sound mind, joined her husband in a deed of said premises.³

Disposition of funds.—Said guardian shall apply the income of said money to the support of said married woman, or allow the same to accumulate, as the court shall direct; and upon the restoration of said married woman to a sound mind, shall, upon the order of the court, transfer to her all the funds in his hands, and upon her death, shall deliver the same to her husband, if he shall be living at her death; if not living, then to her personal representatives.⁴

¹ How. St. § 5765.

² Ibid. § 5756.

³ Ibid. § 5765.

⁴ Ibid. § 5767.

*No. 261. Petition to bar dower of insane wife.**(Venue and address, as in No. 240, ante.)*

1. Your orator, A B, of, etc., respectfully represents, that on, etc., he was lawfully married to one C D, now C B, who is a resident of, etc., in said county and State.

Your orator further represents that the said C B is now about — years of age; and your orator's age is now about — years.

2. That on or about the month of —, A. D. 18—, his said wife, C B, became afflicted with cerebral impairment, causing her to become insane, in which unfortunate condition she has continued ever since, being now over two years last past; and by reason of such insanity, has been unable to join her husband, your orator, in the conveyance of real estate. That your orator is advised by skilled physicians, who have examined into her mental condition, and your orator verily believes and so states the facts to be, that the said C B is incurably insane.

3. Your orator further represents that he is possessed and the owner in fee simple of the following described real estate, situated in said county and state, to wit: *(Here insert description of the premises to be affected by the proceeding.)*

4. Your orator further represents that the value of each piece of said real estate is as follows, to wit: *(Here state the value of each tract; and, if incumbered, set the same forth.)*

5. Your orator further represents that he has sold said real estate to one E F, of, etc., for and in consideration of the sum of — dollars, that being the fair and reasonable value thereof; and that this proceeding has been instituted so that a conveyance of the legal title to said premises may be made to the said E F, in accordance with said contract of sale.

6. Your orator further represents, that such sale is desirable and necessary for the following reasons: that, etc. *(Here set forth the reasons why such sale is desirable.)*

Forasmuch, therefore, as your orator is without remedy in the premises, except in a court of equity, your orator prays:

I.

That the court may enter an order that this petition shall be set for hearing on a day certain to be fixed by the court;

II.

That notice of such hearing be given by publication, or otherwise, as the court may direct;

III.

That at such hearing a guardian *ad litem* may be appointed by the court for the said C B;

IV.

That the said C B, if she appear in person, or by counsel, or by guardian *ad litem*, may be required to answer this petition in such manner and time as the court may direct;

V.

That the court proceed summarily, upon oral or written evidence, taken under the order of court, to hear and determine the matters aforesaid; or refer the same to the circuit court commissioner, or a special commissioner to be appointed by the court for the purpose of taking proofs, and reporting the same, with his opinion, to the court.

VI.

That upon the coming in of said report, the court may make such order in the premises as shall be just and equitable, as provided by statute in such cases made;

VII.

That the inchoate right of dower of the said C B may be sold and her right of dower barred;

VIII.

And that your orator may have such other and further relief as shall be agreeable to equity and good conscience.

(*Add affidavit.*)

A B.

CHAPTER XLIX.

CONTEMPTS.

- Section 1. NATURE OF.
2. PROCEEDINGS BY ATTACHMENT.
3. PROCEEDINGS BY ORDER TO SHOW CAUSE.
4. PUNISHMENT AND DISCHARGE.

SECTION I.

NATURE OF.

We have already considered that class of contempts arising from refusal to appear and answer after service of process. That class of contempts are called ordinary. They are purged by complying with the requirements of the court. There is another class of contempts called extraordinary, which may be punished by fine or imprisonment. They are such contempts as offend against the dignity of the court.

The statute provides that every court of record shall have power to punish, by fine and imprisonment, or either, any neglect or violation of duty, or any misconduct by which the rights or remedies of a party in a cause or matter depending in such court, or triable therein, may be defeated, impaired, impeded or prejudiced in the several cases specified in the subdivisions of the section.¹

The power of the court to punish for contempts extends over parties to suits, attorneys, counselors, solicitors, and all other parties, for the non-payment of any money ordered by the court to be paid, or case where, by law, execution can not be awarded for the collection of such sum, or for any other disobedience of any lawful order, decree or process of the court. It also extends to all cases where attachments and proceedings for contempts have been usually adopted and practiced in

¹ How. Stat. § 7257.

courts of record to enforce the civil remedies of a party, or to protect the rights of such party.¹

Whenever disorderly, contemptuous or insolent behavior is committed during the sitting of the court, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority, or there is any breach of the peace, noise or disturbance, directly tending to interrupt the proceedings of the court, the same are punishable as criminal contempts.²

A circuit judge may take cognizance of his own knowledge of contempts committed during the sittings of the court and in its immediate view and presence, and may proceed to punish summarily persons guilty of such contempts, basing his action entirely upon his own knowledge.³

When the contempt is not committed in the immediate view and presence of the court, due proof, positive statements in affidavits, should be made to the court, and the accused given a reasonable time to prepare his defense.⁴ A rule should be entered based upon such affidavits either that an attachment issue, or that the accused show cause at a certain time and place why he should not be punished for the alleged contempt.⁵ An attachment for contempt can not be issued without an order from the court.⁶

Criminal contempts are punished by fine or imprisonment, or both, in the discretion of the court.⁷ The amount of fine and length of the imprisonment is limited by the statute.

When the court makes any rule or order for the payment of costs, or any other sum of money, and proof is made by affidavit of personal demand for the same, and a refusal to pay it, the court may order a precept to commit the person so disobeying to prison, until such sum and the costs and the expenses of the proceeding are paid.⁸ But before punish-

¹ How. Stat. §§ 7257-7289.

⁵ *Wood's case*, 82 Mich. 75.

² How. Stat. § 7234; see *Bromley v. People*, 7 Mich. 477-8; *Schwab v. Coots*, 44 Mich. 463; *Langdon v. Circuit Judge*, 76 Mich. 368.

⁶ *Thompson v. Ellsworth*, 39 Mich. 719.

³ *Wood's case*, 82 Mich. 75.

⁷ How. Stat. § 7235; *Sloman's case*, 95 Mich. 264.

⁴ How. Stat. § 7259; *Verplank v. Hall*, 21 Mich. 469; *Wood's case*, 82 Mich. 75; *Montgomery v. Palmer*, 100 Mich. 436.

⁸ How. Stat. § 7260; *Haines v. Haines*, 35 Mich. 138; *North v. North*, 39 Mich. 67; *Brown v. Brown*, 22 Mich. 299.

ment, the party must have an opportunity to be heard,¹ and there must have been a demand made upon him personally. The remedy is a harsh and extreme one, but it is allowable to compel obedience to an order requiring temporary alimony. We have already pointed out the steps to be taken to put a party in contempt for failure to pay money on the order of the court.²

The Circuit Courts of this State have power to punish, as for a contempt of court, any person guilty of an attempt to bring about a disagreement of a jury in a pending suit by bribery.³

Courts of record have inherent power to hear and determine all contempts of court which the superior courts of England had at the common law; and the statutes have not undertaken to limit or prohibit their jurisdiction, but are in affirmation of this common law power, and have regulated the mode of proceeding, and prescribed what punishment may be inflicted.

The classification in How. Stat. § 7234, embraces mostly those contempts which are offenses against the court as a tribunal of justice, tending to lessen its dignity, condemn its mandates, impair the respect due to its authority, or interrupt its proceedings, which, if committed in the immediate view and presence of the court, may be summarily punished; and in other cases the party must be notified of the accusation, and have a reasonable time to make his defense.

Two purposes are apparent in the statutory enactments of Ch. 256, How. Stat.:

1. To enforce the civil rights and remedies of parties to an action pending in court.

2. To protect the rights of parties in civil actions.

Each is for the benefit of suitors; but one is for the particular benefit of a suitor in enforcing his civil rights, and affords a particular remedy; while the other is a general benefit to both parties to protect their rights in the action. The one is a sword of execution; the other a shield for protection.⁴

Violation of injunctions.—Injunctions must be fairly and

¹ *Steller v. Steller*, 25 Mich. 159.

³ *Langdon v. Wayne, etc.*, 76 Mich.

² *Ante*, page 517; see *Potts v. Potts*, 68 Mich. 492.

358.

⁴ *Langdon v. Circuit Judge*, 76 Mich. 358.

honestly obeyed; and it would be unbecoming the dignity of the court to permit them to be evaded by mere subterfuges, or tricks. Neither the belief, motive, nor intent with which the writ is disobeyed in any manner varies the responsibility of the party who violates it; on the contrary, they are liable for its violation in whatever capacity or from whatever motives they may have acted.¹

SECTION II.

PROCEEDINGS BY ATTACHMENT.

The foundation for an attachment is laid by affidavits.²

A copy of such affidavits must be served upon the accused, except in cases of disobedience of a rule or order requiring the payment of money, or any *subpœna*, and reasonable time must be given him to make his defense.³

When an attachment issues on the special order of the court the order specifies the penalty in which the accused may give a bond for his appearance.⁴ In other cases, when a party is entitled to an attachment without the special order of the court, the judge of the court or some officer authorized to perform the duties of such judge, upon due proof of the facts, will direct the penalty of the bond and indorse the order on the writ.⁵

After the arrest of the defendant, he will be discharged, upon his executing the proper bond.⁶

If the accused is unable to travel or attend court personally by reason of sickness or otherwise, this is sufficient excuse for not bringing him before the court.⁷

When the officer returns the attachment, he also returns the bond, if any is taken, and files the same with the attachment.⁸ If the officer fails to return the writ by the return day, upon due proof of such default an attachment may be issued against

¹ *Silver Co. v. Schimmel*, 59 Mich. 524; *Romeyn v. Caplis*, 17 Mich. 449; *People v. Sturdevant*, 9 N. Y. 263.

² How. Stat. § 7259; see *Verplank v. Hall*, 21 Mich. 469; *Thompson v. Ellsworth*, 39 Mich. 719.

³ *Ib.*; *Berry v. Innes*, 35 Mich. 189.

⁴ How. Stat. § 7262.

⁵ How. Stat. § 7266.

⁶ How. Stat. §§ 7267, 7272.

⁷ How. Stat. § 7289.

⁸ *Ib.*; § 7272.

him upon the allowance of the proper officer.¹ The allowance must state the cause of issuing the same, and that the defendant is not to be discharged upon bail until ordered by the court.²

The officer arrests the defendant and keeps him in his custody, bringing him personally before the court, and detaining him subject to its order.³ Interrogatories must then be filed, specifying the matters alleged against the accused, and requiring his answer, which must be in writing and upon oath, and filed within such reasonable time as the court allows.⁴ Affidavits in confirmation of and contradicting the answer may be received by the court, and upon the original affidavits, the answer and these subsequent affidavits, the court determine whether the accused is in contempt.⁵

SECTION III.

PROCEEDINGS BY ORDER TO SHOW CAUSE.

When an order to show cause is sought, requiring the party to advance reasons why he should not be punished for contempt, it should be founded upon affidavits as attachment proceedings, and the order and affidavits upon which it is founded must be served upon the accused personally, within such reasonable time as the court orders. On the hearing of the order, if the contempt is denied the same proceedings are had, as upon the return of an attachment. If the party fails to appear, or shows no sufficient cause, the court may make a final order imposing the final punishment. The court must be satisfied by proper proof, that the order to show cause, and copies of the affidavits upon which it is founded have been served personally upon the defendant.⁶

If the accused is in the custody of an officer by virtue of an execution against his body, or by virtue of any process for any other contempt or misconduct, the court may award a writ of

¹ How. Stat. § 7273.

² *Ib.*

³ Comp. L. 1871, § 5706; How. Stat. § 7274.

⁴ How. Stat. § 7275.

⁵ How. Stat. § 7275; see *People v. Kidd*, 23 Mich. 440.

⁶ 2 Barb. Ch. Pr. 278; *Bank v. Schermerhorn*, 9 Paige, 372; *Pitt v. Davidson*, 37 Barb. 97; *McCredie v. Senior*, 4 Paige, 378.

habeas corpus, to bring up the body of such person to answer for such misconduct, and in cases where a party is entitled to an attachment against any person without the special order of the court, and such person shall be in custody, a writ of *habeas corpus* may be allowed by any judge of the court or any officer authorized to perform the duties of such judge in vacation.¹ Upon this writ the sheriff, in whose custody the party is, brings him before the court and detains him there to await its order.²

When a rule has been entered in any court, according to the practice thereof, requiring any officer, or other person to whom any process of such court may have been directed and delivered, to return the same, an attachment for disobedience of such rule may issue according to the practice of the court, to arrest such officer or person to answer for such disobedience, without special application to the court.³

SECTION IV.

PUNISHMENT AND DISCHARGE.

If the defendant is found guilty of the misconduct alleged against him, and the court finds that it was calculated to, or actually did defeat, impair or prejudice the rights or remedies of any party, in a cause or matter in such court, a fine or imprisonment may be imposed, or both, as the nature of the case shall require.⁴ Instead of imposing a fine, the court may order a sum paid to indemnify the injured party.⁵ When this is done a fine can not be imposed in addition.⁶ In all cases than those specified, the fine must not exceed two hundred and fifty dollars over and above the costs and expenses of the proceedings.⁷ And when the contempt consists in omitting to perform some act or duty that the accused can yet perform

¹ Comp. L. 1871, §§ 5695, 5696; How. Stat. §§ 7263, 7264.

² Comp. L. 1871, § 5697; How. Stat. § 7265.

³ Comp. L. 1871, § 5694; How. Stat. § 7262.

⁴ Comp. L. 1871, § 5708; How. Stat. § 7276.

⁵ Comp. L. 1871, § 5709; How. Stat. § 7277; *Holland v. Weed*, 87 Mich. 584; *Smith's Appeal*, 86 Mich. 149; *Montgomery v. Boom Co.*, 104 Mich. 411.

⁶ *Haines v. Haines*, 35 Mich. 146.

⁷ Comp. L. 1871, § 5710; How. Stat. § 7278.

he shall only be imprisoned until he performs the same, and pays the fine and the costs and expenses of the proceedings,¹ and not for a specific term.²

In all other cases where no special provision is otherwise made by law, if imprisonment is ordered, it must not exceed six months, and until fine, costs and expenses of the proceedings are paid.³

Order of conviction.—Barbour says 'that the order of the court convicting a party of a contempt in a proceeding to enforce a civil remedy, should recite the substance of the alleged misconduct, the adjudication of the court that the accused has been guilty thereof, and that such misconduct was calculated to, and did, impair, defeat, impede and prejudice the rights or remedies of the prosecutor or the parties in the cause. And it should direct the payment of a fine sufficient to indemnify the party injured, and to satisfy the costs and expenses of the proceedings. The order should not direct the party to pay the costs of the proceedings *to be taxed*. But the costs should be taxed and inserted in the order as a part of the fine imposed upon him.

Where anything remains to be done by the accused party to purge his contempt, the order should specify what he is to do, and the manner in which it is to be done to entitle him to a discharge. If the party is committed to prison, the order must specify the duration of the imprisonment.⁵

Process of commitment.—The order of conviction having been drawn up and entered, a process of commitment must be next made out.⁶ When the misconduct complained of consists in the omission to perform some act or duty which is yet in the power of the defendant to perform, the order and the process of commitment must specify the act or duty to be performed, and the amount of the fine and expenses to be paid.⁷ The process must specify the term of imprisonment.⁸

¹ Comp. L. 1871, § 5711; How. Stat. § 7279.

² *Latimer v. Barnes*, 81 Mich. 592.

³ Comp. L. 1871, § 5713; How. Stat. § 7281.

⁴ 2 Barb. Ch. Pr. 279, 280; *Bank v. Schermerhorn*, 9 Paige Ch. 372; see *Scott v. Chambers*, 62 Mich. 532.

⁵ 2 Barb. Ch. Pr. 280; How. Stat. § 7281.

⁶ 2 Barb. Ch. Pr. 280; see *Langdon v. Circuit Judge*, 76 Mich. 358.

⁷ How. Stat. §§ 7279, 7280; 2 Barb. Ch. Pr. 280.

⁸ Comp. L. 1871, §§ 5712, 5713; How. Stat. §§ 7280, 7281.

Sequestration.—Where the party after being committed perseveres in his refusal to do the act required, a sequestration may issue, and his servants, agents, etc., may be prohibited from delivering his property to him, or applying it to his use on pain of contempt.¹

Effect of contempt—How cleared.—It is a general rule that a party in contempt can not apply to the court for a favor that is not a matter of strict right until he has cleared his contempt and paid costs.² But, if the proceedings are irregular, the party may move to set them aside.³ Where there is mere failure on the part of the accused to comply with the provisions of an interlocutory order before the contempt is fixed, he may so apply.⁴

As to the manner in which contempt may be cleared, waived or discharged, see 1 Daniell's Ch. Pr. and 2 Barb. Ch. Pr. An ordinary contempt between parties is cleared by the offending party performing the act neglected, and by paying costs. Where process has been issued against a defendant in contempt for want of answer, he should enter his appearance and pay or tender costs. If complainant's solicitor accepts the costs it will be at his own risk if he puts the process into execution, and if he refuses to accept, the defendant must apply to the court to have the order discharged. When the defendant is in actual custody he can not be discharged without an order of the court. The application of the court should be upon motion or petition on notice to the other party. The application may be supported by affidavits.

Appeal.—An appeal lies to the Supreme Court from an order adjudging a party guilty of contempt for violating an injunction, and awarding a sum of money to the other party.⁵ Also for failure to restore property to a receiver on an order of the court.⁶ And for contempt for non-payment of alimony.⁷

The Supreme Court has authority to inquire into the justice

¹ 2 Barb. Ch. Pr. 280.

² *Peltier v. Peltier*, Har. Ch. 19;
McClung v. McClung, 40 Mich. 496;

³ 2 Barb. Ch. Pr. 281.

⁴ 2 Barb. Ch. Pr. 281.

⁵ *Peltier v. Peltier*, Har. Ch. 19.

⁶ *People v. Simonson*, 9 Mich. 491;

People v. Caplis, 17 Mich. 449.

⁷ *People v. Jones*, 33 Mich. 303.

⁸ *Haines v. Haines*, 35 Mich. 138;
see *Brewer v. Kidd*, 23 Mich. 440.

or propriety of proceedings in contempt, whether before or after commitment, only so far as to ascertain whether the court below has jurisdiction and is proceeding according to law.¹

Admissions of solicitor.—In proceedings for contempt, a solicitor has no authority to admit for his client the truth of the facts alleged against him as the basis of the prosecution, as the respondent can only be bound by written admissions made part of the record, so as to be examinable on appeal.²

When it appears that disobedience to a *mandamus* was due to bad advice of counsel rather than to wilful disregard of the order of the court, a severe fine will not be inflicted.³

*No. 262. Affidavit in support of an attachment for contempt.*⁴

STATE OF MICHIGAN, }
County of Wayne. } ss.

J N, being duly sworn, on oath, states that on, etc., there came on for trial in the circuit court for the said county of Wayne, before the honorable G G, one of the judges of said court, a certain cause therein pending, wherein one J H was the plaintiff, and the D G H & M Ry. Co. was the defendant; that on the day aforesaid a jury was duly selected and sworn to try said cause; that among the jurors selected, impaneled and sworn was one J H B, and also one Z F, with both of whom this deponent is and was well acquainted. That said trial continued from day to day in said court until, etc., when the same was concluded, and a verdict rendered therein; that on, etc., during the pendency of said trial, this deponent met one W W L, a resident of the city of Detroit, and had a conversation with him, during which the said W W L asked deponent if he was acquainted with any of the jurors in said cause on trial; that deponent replied that he was acquainted with the said J H B, one of the jurors so sworn as aforesaid; that said W W L then asked deponent how well he knew him, and deponent replied that he knew him quite well; that the said W W L then related to deponent some of the facts in the case, and told deponent that, if a disagreement of the jury could be procured, this deponent might offer one of the jurors — dollars. That he, the deponent, replied that to do so would be a very serious thing; whereupon said W W L informed deponent that there would be no danger; and deponent then said to said W W L that he would have to think about the matter.

That on the evening of the same day, said W W L came to deponent's house, and then and there again said to this deponent that he authorized him, the deponent, to offer said J H B — dollars, and informed deponent that he would see that said sum of money would be paid, if a disagreement

¹ *Wood's case*, 82 Mich. 75.

³ *Burton v. Tuite*, 80 Mich. 218.

² *Scott v. Chambers*, 62 Mich. 532;
see How. Stat. Chapter 356.

⁴ See form in *Langdon v. Circuit Judge*, 76 Mich. 362.

of the said jury should be secured; and further informed deponent that, if there was any other person on said jury with whom he was acquainted, that this deponent might make him the same offer, and that he, the said W W L, would see that the money would be paid.

That in pursuance of the statements so made to deponent by the said W W L, and this deponent being authorized by the said W W L, met the said J H B, the juror in said cause as aforesaid, in the city hall, and informed him that he, the deponent, was authorized to offer him the sum of — dollars, to be paid to him, the said J H B, if the jury aforesaid should disagree; that subsequent to the time of the conversation between deponent and the said J H B, deponent met the said Z F, another juror on said panel, and, in pursuance of the authority of the said W W L, told him that if he would cause said jury to disagree, he, the said Z F, could make — dollars.

That this deponent was arrested upon an attachment issued out of said court on, etc., and since that time, and the giving of his recognizance to appear in said matter, he has, upon different occasions, met said W W L, and the said W W L has repeatedly told deponent to keep a stiff upper lip, and that he would see him through, and if any money was desired he would put it up.

(Signed) J N.

(Add jurat.)

Interrogatories—Answers—Evidence.—When any defendant arrested upon an attachment shall have been brought into court, or shall have appeared therein, the court shall cause interrogatories to be filed, specifying the facts and circumstances alleged against the defendant, and requiring his answer thereto; to which the defendant shall make written answers on oath, within such reasonable time as the court shall allow; and the court may receive any affidavits or other proofs, contradictory of the answers of the defendant, or in confirmation thereof; and upon the original affidavits, such answers, and such subsequent proof, shall determine whether the defendant has been guilty of the misconduct alleged.¹

(For a form of an attachment, and a form of an order made upon the return of the attachment, directing interrogatories to be filed, and form of order requiring the defendant to enter into a recognizance for his appearance to answer the charges, see *Langdon v. Wayne Circuit Judge*, 76 Mich. 364, 365, 366.)

No. 263. Order for attachment for contempt.²

At a session of the Circuit Court for the county of Wayne, held at the Circuit Court rooms in the city of Detroit, on etc.

¹ How. Stat. § 7275; see *People v. Kidd*, 22 Mich. 440, 442.

² *Langdon v. Wayne Circuit Judge*, 76 Mich. 364.

Present, the Honorable C J R, etc., circuit judge.

In the matter of W W L for an alleged unlawful interference, etc.
Before Judge G.

On filing the affidavits of J N and G F R in said matter, and it appearing to the court, from the matters therein alleged, that an alleged unlawful interference on the part of the said W W L was made by him with the proceedings in the action tried in said court, wherein J H was the plaintiff and the D G H & M Railway Company was the defendant, during the trial of said action.

It is therefore ordered that an attachment do issue to the said W W L, and that he be brought before the court to answer for such alleged misconduct; and that a copy of the affidavits upon which this order is based, together with a copy of this order, be served upon him at the time of the service of such attachment.

.

.

CHAPTER L.

BILLS TO ENFORCE CONTRIBUTION.

- Section 1. WHEN WILL LIE.
2. FORM OF BILL.

SECTION I.

WHEN WILL LIE.

Nature of.—The right in equity for contribution arises when one of several parties, who are liable for a common debt or obligation, discharges the same for the benefit of all. It is not founded on contract, but upon the general principle of equity, that where two or more persons are subject to a common burden, it shall be borne according to their respective interests. It is compensation given in equity for removing the common burden, and the proper forum in which to enforce it, is a court of equity.¹

Jurisdiction.—While jurisdiction at law is sustained, courts of equity have always exercised a concurrent jurisdiction, founded upon the fact that the legal remedy is not under all circumstances full, complete and adequate.

In most cases there is no remedy at law from the extreme uncertainty of ascertaining the relative proportions which different persons, having interests of a different nature, quantity and duration in the subject-matter, ought to pay. And when there is a remedy, it is inconvenient and imperfect, because it involves multiplicity of suits, and opens the whole matter for contestation anew in every successive litigation.

¹ Story's Eq. Jur., Sec. 492; *Golsen v. Brand*, 75 Ill. 148; *Griffith v. Robinson*, 14 Ill. App. 377; *Drummond v. Yager*, 10 Ill. App. 380; *Becker v. Farwell*, 25 Ill. App. 432; *Campbell v. Mesier*, 4 Johns. Ch. 334; *Aspinwall v. Sacchi*, 57 N. Y. 331; *White v. Banks*, 21 Ala. 705; *Russell v. Failer*, 1 Ohio St. 327.

tion. The remedial justice of courts of equity, in all cases of contribution, is so complete, and so flexible in its adaptation to all the particular circumstances and equities, that it has, in a great measure, superseded all efforts to obtain redress in any other tribunal.¹

As between sureties.—Where there are two or more sureties and one pays the debt for which all are bound, he has a right to enforce contribution from the others through the medium of a court of equity.² His right to contribution is complete as soon as he pays the debt, and he may at once enforce contribution;³ but he must have actually paid the debt.⁴ At law a surety can recover from his co-surety only that co-surety's aliquot part, calculated upon the whole number, without reference to the insolvency of either of the co-sureties;⁵ but in equity it is otherwise.⁶

In equity the rule is that the insolvency of the principal must be alleged and proved before the surety is entitled to contribution from his co-surety.⁷

In equity contribution can be enforced against the repre-

¹ 1 Story's Eq. Jur., Secs. 483-505; *Cary v. Holmes*, 16 Gray, 127; *Whitman v. Porter*, 107 Mass. 522; *Nickerson v. Wheeler*, 108 Id. 295; *Edsell v. Briggs*, 20 Mich. 429; *McGunn v. Hanlin*, 29 Mich. 383; *Smith v. Rumsey*, 33 Mich. 194; *Rynearson v. Turner*, 52 Mich. 7.

² *Klein v. Mather*, 2 Gilman, 317; *Conover v. Hill*, 76 Ill. 342; *Pinkston v. Talliaferro*, 9 Ala. 547; *Eddy v. Trevor*, 6 Paige, 521; *Hickman v. McCurdy*, 7 J. J. Marsh, 560; *Bonham v. Galloway*, 13 Ill. 68; *Mitchell v. Sproul*, 5 Id. 270; *Stewart v. Goulden*, 52 Mich. 143.

³ *Sloo v. Pool*, 15 Ill. 47; *Chafee v. Jones*, 19 Pick. 260.

⁴ *Camp v. Bostwick*, 20 Ohio State, 337; 1 Leading Cases Eq., Section 330; *Wood v. Leland*, 1 Metc. (Mass.) 387; but see *Waters v. Rily*, 2 H. & J. 306; *McKenna v. George*, 2 Rich. Eq. 15.

⁵ *Samuel v. Zachery*, 4 Ired. L. 377; *Currier v. Fellows*, 7 Foster, 366; *Browne v. Lee*, 6 B. & C. 689; *Dodd v. Winn*, 27 Mo. 501.

⁶ *Burrows v. McWham*, 1 Desaus. 409; *Breckenridge v. Taylor*, 5 Dana, 110; *Bispham's Prin. Eq.* § 329; 1 *Parsons on Contracts*, 36; *Sloo v. Pool*, 15 Ill. 47; *Moore v. Bruner*, 31 Ill. App. 400; *Dodd v. Winn*, 27 Mo. 501; *Bell v. Jasper*, 2 Ired. Eq. 597; *McKenna v. George*, 2 Rich. Eq. 15; 1 *Story's Eq. Jur.* § 496; *Couch v. Terry*, 12 Ala. 225; *Stewart v. Goulden*, 52 Mich. 143; *Rynearson v. Turner*, 52 Mich. 7; *North v. Brace*, 30 Conn. 72.

⁷ *Morrison v. Poyntz*, 7 Dana, 307; *Pearson v. Durkham*, 3 Litt. 385; *Sloo v. Pool*, 15 Ill. 47; *Burrows v. McWham*, 1 Desaus. 409; *Raney v. Yarb*, 2 Ired. Eq. 249; *Daniel v. Ballard*, 2 Dana, 296; but see *Odlin v. Greenleaf*, 3 N. H. 270.

sentatives of a deceased surety, but in law the rule is otherwise.¹

A surety has no right to speculate upon the debt. If he compromises the claim his co-sureties are entitled to the benefit of the compromise. They are responsible only for their proportion of the amount actually paid;² nor has a surety any right to speculate upon his principal.³

Between wrongdoers.—The law will not compel contribution between wrongdoers;⁴ but this rule applies only to cases where the tortfeasor seeking contribution knew or must be presumed to have known that his act was unlawful.⁵

Between joint tenants.—It is a familiar rule in equity that where joint owners or tenants in common hold property incumbered or burdened in such a manner as to endanger the common title, either of the parties may make advances to protect the title and compel contribution from the other owners in proportion to their interests in the common property. This doctrine has been applied to the payment of taxes, mortgages, judgments, liens, mechanic's liens and to purchasing outstanding titles, upon the principle that the party claiming an equity of benefit must submit to an equality of burden,⁶ but a joint tenant in common has not the right to contribution for the expense

¹ *Primrose v. Bromley*, 1 Atk. 89; *Wayland v. Tucker*, 4 Gratt. 267; *Couch v. Terry*, 12 Ala. 225; *Chipman v. Morrill*, 20 Cal. 130; *Wright v. Hunter*, 5 Ves. 792; *Conover v. Hill*, 76 Ill. 342; *Rynearson v. Turner*, 52 Mich. 7.

² *Hickman v. McCurdy*, 7 J. J. Marsh. 555; *Jones v. Bradford*, 25 Ind. 305.

³ *Wynn v. Brooke*, 5 Rawl. 106; *Bonney v. Seely*, 2 Wend. 581; *Lawrence v. Blow*, 2 Leigh. 30; *Comegys v. Bank*, 6 Ind. 357; *Crozier v. Grayson*, 4 J. J. Marsh. 517; *Klein v. Mather*, 2 Gilm. (Ill.) 317.

⁴ *Merryweather v. Nixon*, 8 D. & E. 186; *Nelson v. Cook*, 17 Ill. 443; *Burtie v. Nutt*, 4 Pet. 184; *Peck v. Ellis*, 2 Johns. Ch. 131; *Miller v. Fenton*, 11 Paige, 18; *Anderson v. Saylor*, 3 Head. (Tenn.) 551.

⁵ *Jacobs v. Pollard*, 10 Cush. 278; *Adamson v. Jarvis*, 4 Bing. 66; *Acheson v. Miller*, 2 Ohio St. 203; *Farwell v. Becker*, 129 Ill. 261; *Wehle v. Haviland*, 42 How. 399; *Armstrong v. Claner*, 66 Pa. St. 218; *Bailey v. Bussing*, 28 Conn. 455; *Covenentry v. Barton*, 17 Johns. 141; *Smith v. Ayrault*, 71 Mich. 475; *Moore v. Appleton*, 26 Ala. 633.

⁶ *Louvalle v. Menard*, 1 Gilman, 39; *Howey v. Goings*, 13 Ill. 95; *Dean v. O'Mera*, 47 Ill. 120; *Gardner v. Diederichs*, 41 Ill. 158; *Titsworth v. Stout*, 49 Ill. 78; *Kurtz v. Hibner*, 55 Ill. 514; *Wilton v. Tazwell*, 86 Ill. 29; *Griffith v. Robinson*, 14 Ill. App. 377; *Vogle v. Brown*, 120 Ill. 338; *Burgett v. Taliaferro*, 118 Ill. 503; *Dowus v. Jackson*, 33 Ill. 464; *Briscoe v. Power*, 85 Ill. 420; see *Norris v. Hill*, 1 Mich. 202.

of improvements or alterations placed or made upon the property, against the protest of his co-tenant.¹ Nor can a minor be charged with the cost of improvements upon his estate during his minority, and without the authority of the probate court, when he elects to repudiate all liability therefor.²

Between co-obligors—Partners.—Where there is a joint legal liability resting upon all the parties to an agreement and one of them pays and discharges the same, he may compel contribution from the others to the extent of his advances.³

Where one of several obligors discharges the indebtedness either with or without suit and legal compulsion, he may maintain his action against his co-obligors for contribution.⁴

A joint debtor can not be compelled to wholly reimburse another who has paid the joint debt, unless as between themselves the latter is surety.⁵

Contribution lies between partners for any excess which has been paid by one partner, beyond his share, against the other partners, if upon a winding up of the partnership affairs such a balance appears in his favor, or if upon a dissolution he has been compelled to pay any sum for which he ought to be indemnified.⁶

A bill filed against a retiring partner to obtain contribution toward joint debts and which is not framed as a bill against all persons interested nor for the purpose of winding up the business can not be maintained without showing the specific liabilities for which contribution is sought; but where a settlement is sought which will embrace the whole debts, paid and unpaid, a bill in equity will lie to obtain contribution.⁷

Between legatees and devisees.—The debts or claims against the estate of a deceased person are a common burden and must be borne by all the property devised by the deceased.⁸

And if the portion of one heir has been taken to pay the

¹ *Field v. Leiter*, 117 Ill. 341.

² *McParland v. Larkin*, 155 Ill. 84.

³ *Pixley v. Gould*, 13 Ill. App. 565;

Bailey v. Bussing, 28 Conn. 455;

Horbach v. Elder, 18 Penn. St. 33;

Harvey v. Drew, 82 Ill. 606.

⁴ *Harvey v. Drew*, 82 Ill. 606;

Klein v. Mather, 2 Gilm. 317.

⁵ *Stewart v. Estate*, 39 Mich. 619.

⁶ 1 Story's Eq. Jur. § 504; *Sills v. Hubbard*, 2 Johns. Ch. 394.

⁷ *Glynn v. Phettyplace*, 26 Mich. 383.

⁸ *McGunn v. Hanlin*, 29 Mich. 383.

⁹ *Deltzer v. Schuester*, 37 Ill. 301; *Griffith v. Robinson*, 41 Ill. App. 377.

debt of the ancestor, he is entitled to contribution from his coheirs.¹

The statutes of Michigan, in conformity with the common law, provide that where specific legatees take possession of their legacies before the estate is settled they shall be held liable to contribution in case any claim arises chargeable against their bequest, to such an amount as shall be settled and decreed by the Probate Court, and that the claimant may also have a remedy in any proper action in law or equity.²

Between stockholders.—Where a stockholder in a corporation, the charter of which imposes an individual liability upon its stockholders for the debts of the corporation, has been sued, and has paid the recovery to a creditor, he will be entitled to contribution from all the other stockholders, and in enforcing that right a court of equity is the proper forum, as in it he can compel each stockholder to contribute *pro rata* according to the number of shares he may hold.³

Where a creditor of a corporation, after judgment against it and the return of execution unsatisfied, seeks satisfaction against a single delinquent stockholder, the latter may file his cross-bill, obtain a discovery of the other stockholders, and bring them before a court and enforce contribution from all who are alike delinquent.⁴

Party wall.—Where a party wall becomes ruinous, one of the parties, on due notice to the other, may pull down and rebuild the wall, and is entitled to contribution toward the expense from the other party. But if he builds the wall higher or of more costly materials, he is bound to pay the extra expense.⁵ Where one party erects a wall one-half on his own ground, and one-half on that of the adjoining owner, without any agreement, either express or implied, for a contribution by the

¹ *Schermerhorn v. Barhydt*, 9 Paige, 98; *Taylor v. Taylor*, 8 B. Mon. 419; *Long v. Short*, 1 P. Wms. 403; *Livingston v. Livingston*, 3 Johns. Ch. 148; *Clowes v. Dickenson*, 5 Johns. Ch. 235.

² How St. §§ 5818-19-20; *Eberstein v. Camp*, 37 Mich. 176; *Proctor v. Robinson*, 35 Mich. 290; *At-*

wood v. Frost, 51 Mich. 363; S. C., 59 Mich. 409; S. C., 73 Mich. 67.

³ *Wincock v. Turpin*, 96 Ill. 136.

⁴ *Hatch v. Dana*, 101 U. S. 205; *Beach on Pr. Corp.* § 700, note 4; *Cook on Stockholders*, § 206; *Young v. Farwell*, 139 Ill. 326.

⁵ *Campbell v. Mosier*, 4 Johns. Ch. 334; *Rindge v. Baker*, 57 N. Y. 209; *Cranshaw v. Sumner*, 56 Mo. 517.

latter in relation thereto, and such adjoining owner subsequently builds and uses such wall, he can not be compelled to contribute any part of the cost of its erection.¹

Parties to bill.—On a bill to enforce contribution by one surety against a co-surety, the principal and other sureties who are insolvent are not necessary parties.² And sureties out of the jurisdiction may be disregarded.³

SECTION II.

FORM OF BILL.

No. 264. Bill against co-sureties upon promissory note.

(*Venue and address as in No. 240, ante.*)

1. Your orator, A B, of, etc., respectfully represents that on, etc., one Y Z, as principal, and C D, E F and G H, the defendants hereinafter named, as sureties, executed and delivered to one W X, a promissory note for the sum of — dollars, payable to the order of the said W X, in — after the date thereof, with interest thereon at the rate of — per cent. per annum.

2. That the said Y Z, upon the maturity of the said note, failed and neglected to pay the same or any part thereof, and that afterwards the said W X brought suit upon the said promissory note in the Circuit Court of — County, Michigan, and on the — day of — 18—, recovered a judgment against the said Y Z, C D, E F, G H and your orator, for the sum of — dollars, as from the records of said court, a transcript of which is hereto attached, marked "Exhibit A," will more fully appear.

3. Your orator further represents that afterwards, on, etc., he paid to the said W X the sum of — dollars, being the amount of the said judgment, with legal interest thereon from the date of its rendition, in full discharge and satisfaction of the same.

4. Your orator further represents that when the said note became due as aforesaid the said Y Z and the said C D were, and from that time continued to be and still are, insolvent and unable to pay the amount of said note or said judgment, or any part thereof, and that the institution of a suit against them or either of them, would have been unavailing, by reason whereof the said E F and G H have each become severally liable

¹ *McCord v. Herrick*, 18 Ill. App. 423; *Huck v. Flentye*, 80 Ill. 258; 2 Greenl. Ev. §§ 107, 108.

² *Johnson v. Vaughn*, 65 Ill. 426; Story's Eq. Pl. § 169; *Couch v. Terry*, 12 Ala. 225; *Burroughs v. Lutt*, 19 Cal. 125; see *Rainey v.*

Yarb, 2 Ired. (N. C.) Eq. 249; *Trescott v. Smyth*, 1 McC. (S. C.) Ch. 301; *Young v. Lyons*, 8 Gill. 162.

³ *Jones v. Blanton*, 6 Ired. (N. C.) Eq. 115; *Currier v. Baker*, 51 N. H. 613.

in equity, to pay to your orator an aliquot portion or share of the amount so paid by your orator in satisfaction and discharge of said judgment as aforesaid.

Forasmuch, therefore, as your orator is without remedy in the premises except in a court of equity, your orator prays :

I.

That the said E F and G H, who are made parties defendant to this bill, may be required to make full and direct answer thereto;

II.

That upon a hearing hereof the said E F and G H may each respectively be decreed to pay to your orator an equal one-third part of the amount so paid by him in payment, satisfaction and discharge of said judgment as aforesaid, together with interest thereon from the date of said payment;

III.

And that your orator may have such other and further relief in the premises as equity may require and to the court shall seem meet.

(Add prayer for process and exhibit.)

CHAPTER LL.

PRACTICE IN THE SUPREME COURT.

- Section 1. JURISDICTION OF THE SUPREME COURT.
2. RULES OF PRACTICE IN THE SUPREME COURT.
3. WRITS OF CERTIORARI.
4. HABEAS CORPUS AND CERTIORARI.
5. WRITS OF ERROR.
6. APPEAL FROM CIRCUIT COURTS IN CHANCERY.
7. MOTIONS.
8. AMENDMENTS OF RECORD.
9. ASSIGNMENTS OF ERROR.
10. PRINTED RECORD.
11. PRINTED BRIEFS.
12. THE ARGUMENTS.
13. CALENDAR OF COURT.
14. HEARING.
15. REHEARING.
16. COSTS.

SECTION I.

JURISDICTION OF THE SUPREME COURT.

The Supreme Court has a general superintending control over all inferior courts, to prevent and correct errors and abuses therein, where no other remedy is expressly provided by law, and has also jurisdiction of suits, actions and matters brought before it by writ of *certiorari*, or writ of error, when the same shall be allowed by law to any inferior court, to magistrates and other officers, as well as in cases of prosecution for any offense, misdemeanor or penalty, in the name of the people of this State, as in other cases, and by certificate of any circuit judge of any cause pending or tried before him, or by a case made and agreed upon by the parties or their attorneys, in any Circuit Court, and certified by the clerk of such Circuit Court, and shall have power to issue writs of *error*, *certiorari*, *habeas corpus*, *mandamus*, *quo warranto*, *procedendo*, *prohibition*, *supersedeas*, and all other original and remedial writs

which may be necessary for the due execution of the law and the administration of justice, and the full and perfect exercise of its jurisdiction, and hear and determine the same. In all other cases it has appellate jurisdiction only.¹

Appellate jurisdiction.—At any of the general terms of said courts it shall exercise its appellate jurisdiction in suits in equity and at law, and in probate cases originating in any part of the State.²

To establish rules of practice.—The judges of the Supreme Court have power, and it is their duty, by general rules, to establish, and from time to time to modify and amend the practice in said court, and in the Circuit Courts, at law and in equity, in the cases not provided for by any statute.³

Power to compel discovery of books, papers, etc.—The Supreme Court has power, in all such cases as shall be deemed proper, to compel any party to a suit pending therein, to produce and discover books, papers and documents in his possession or power, relating to the merits of any such suit, or of any defense therein.⁴

To prescribe practice in certain cases.—The Supreme Court may, among other things, regulate and prescribe the practice therein, and in the Circuit Courts, where the same is not prescribed by any statute, in relation to bills of exception, cases made by the party, special verdicts, granting new trials, motions in arrest of judgment, taxation of costs, giving notice of special motions, and of such other proceedings as the court may think proper; staying proceedings when necessary to prevent injustice, and the hearing of motions, imposing terms in their discretion, on granting such motions.⁵

To prescribe the powers of Circuit Courts, etc., as to orders to stay proceedings, etc.—In cases not otherwise provided for, the Supreme Court shall have power, from time to time, by general rules, to prescribe the cases in which the Circuit Courts, or any judge thereof, or circuit court commissioner, may grant orders to stay proceedings in causes and matters pending in the Circuit Courts, and, upon process issued

¹ How. Stat. § 6404; § 3, Art. VI
of Const.

² How. Stat. § 6405.

³ How. Stat. § 6409.

⁴ How. Stat. § 6411.

⁵ How. Stat. § 6418.

therefrom, the effect of such orders, and the terms and conditions on which they shall be granted.¹

Equal division of the court.—When the judges of the Supreme Court shall be equally divided in opinion upon any case submitted to them, brought before said court by appeal, *certiorari*, or writ of error, the judgment or decree of the court below shall be affirmed, provided three of said judges shall concur in such opinion.²

An affirmance upon an equal division is the judgment of the court, and no other tribunal can question it.³ But it may be a question whether the statutory affirmance of a judgment on an equal division of the court fixes the rule of law for any case but the one under review.⁴

Majority decision.—Where a decision is concurred in by a majority of the members of the court, it is as conclusive upon the points decided as if unanimously rendered; and the question thus passed upon is not open to controversy in a subsequent suit.⁵

Source of power to review.—The power of the Supreme Court to review the action of the Circuit Court is derived entirely from the statute and the common law practice on bills of exceptions; and if the action of the Circuit Court has not been excepted to, the Supreme Court can not review it.⁶ And such court has nothing to review in a case at law if the trial court has made no ruling.⁷

Non-judicial controversies.—The constitution has not empowered the Supreme Court to settle non-judicial controversies, the same being wisely left to the proper local and representative agencies of the people.⁸ And the Supreme Court has no superintending control over the judicial action exercised by the house and senate in the discharge of their legislative duties.⁹

¹ How. Stat. § 6419.

² How. Stat. § 6420; see *R. R. Co. v. Taft*, 28 Mich. 289; *Whiting v. Butler*, 29 Mich. 145; *Sands v. Finan*, 38 Mich. 616; *Whiting v. Butler*, 38 Mich. 616.

³ *Lyon v. Ingham*, *Circuit Judge*, 37 Mich. 379.

⁴ *State Tax Law cases*, 54 Mich. 350.

⁵ *Feige v. R. R. Co.*, 62 Mich. 1.

⁶ *McLean v. Scripps*, 52 Mich. 215.

⁷ *People v. Murray*, 52 Mich. 289.

⁸ *Hipp v. Supervisors*, 62 Mich. 456; *McDonald v. City*, *Ib.* 555; see *Williams v. Mears*, 61 Mich. 86.

⁹ *People v. Mahoney*, 13 Mich. 481; see *McBride v. Grand Rapids*, 32 Mich. 428.

The Supreme Court has no original jurisdiction in equity;¹ and having appellate powers only, it can not consider facts not contained in the record as heard in the court below.²

It inquires into the facts as contained in the record, and upon them only, determines the questions involved.³

What the court reviews.—On an appeal for a final decree the court will review all previous orders connected with the decree and affecting the merits. On an appeal from a final order, the court will only review so much of the proceedings, or such orders as are connected with the final order.⁴ An appeal takes up the entire record as a whole, upon all the facts, with all the matters of discretion open for consideration by the Supreme Court, precisely as they were in the court below, as though the case had not been heard before; and the court will make such order as should have been made by the lower court. Yet, the orders of the lower court will not be disturbed, unless it satisfactorily appears that they require correction.⁵ The Supreme Court will not, therefore, review the rulings of the court below in matters of practice, when those rulings do not affect the merits of the cause.⁶ The appellant must convince the court, not only that the court below was wrong, but also that the error committed was prejudicial to him.⁷ Thus, where one of the several parties appeals, he can not ask for a reversal of a decree, for errors in no way affecting him.⁸ The Supreme Court must be satis-

¹ *Bank v. Niles*, Walk. Ch. 398; *Bailey v. De Graff*, 2 Doug. 169; *Palmer v. Rich*, 12 Mich. 414; *Adams v. Field*, 25 Mich. 16; *King v. Carpenter*, 37 Mich. 366; *Maxfield v. Freeman*, 39 Mich. 65.

² *Wright v. Dudley*, 8 Mich. 115; *Verplank v. Hall*, 45 Mich. 469.

³ *McCullough v. Day*, 45 Mich. 554; see *Schwab v. Coats*, 44 Mich. 463.

⁴ *Benedict v. Thompson*, 2 Doug. 299.

⁵ *Warner v. Whittaker*, 6 Mich. 134; *Oliver v. Shoemaker*, 35 Mich. 464; *Abbott v. Alsdorf*, 19 Mich. 157; *English v. Carney*, 25 Mich. 178.

⁶ *Bailey v. De Graff*, 2 Doug. 269; *Morris v. Morris*, 5 Mich. 171;

Kellogg v. Putnam, 11 Mich. 344; *Haines v. Haines*, 35 Mich. 138; *Johnson v. Shephard*, 35 Mich. 115; *Bilz v. Bilz*, 37 Mich. 116; *Bennett v. Nichols*, 12 Mich. 22; *Ins. Co. v. Whittemore*, 12 Mich. 311; *Ins. Co. v. Renz*, 33 Mich. 298.

⁷ *Hess v. Final*, 32 Mich. 515; see *Shelden v. Weatherwax*, 75 Mich. 418.

⁸ *Griggs v. R. R. Co.*, 10 Mich. 117; *Dye v. Mann*, 10 Mich. 291; *Ins. Co. v. Whittemore*, 12 Mich. 427; *Martin v. McReynolds*, 6 Mich. 70; *Warner v. Whittaker*, 6 Mich. 133; *Kellogg v. Putnam*, 11 Mich. 344; *Campau v. Campau*, 19 Mich. 116; *Phillips v. Stanch*, 20 Mich. 369;

fied that a decree is wrong, before it will be reviewed.¹ And no matter how erroneous the reasons may be that are advanced by the court below, if the decree is correct it will not be disturbed.²

It being a general rule that a commissioner's report, unless excepted to, will be received as true, the Supreme Court on appeal will not review or re-examine any part of a decree that is based on such a report.³ However, if an interlocutory decree preceding a reference, decides the turning point in the case, exceptions to the report are not necessary to obtain a review. In such an instance, the determination of the court and not the commissioner, will be involved, and failure to except to one implies no acquiescence in the action of the other.⁴ In order to have them considered, formal objections to a decree should be taken in the court below,⁵ and unless the objection insisted on upon appeal was presented by the record in the court below, it will not be considered. So, objections not made in the lower court, and urged by a party who has taken no appeal, will not be considered.⁶ Where no motion to suppress depositions is made in the circuit, and no objections are there made to them, it is too late to raise the objections in the Supreme Court.⁷ And the Supreme Court will not review, on appeal, questions in reference to the taxation of costs, unless the court below has first been required to pass upon them.⁸ A point not sufficiently raised by demurrer, can not, on appeal, be raised for the first time.⁹

Ins. Co. v. Horton, 28 Mich. 173; *Davis v. Bush*, 28 Mich. 432; *Richards v. Tozer*, 27 Mich. 451; *Hill v. Mitchell*, 40 Mich. 390; *Robertson v. Gibbs*, 38 Mich. 165; *Ellis v. Spaulding*, 39 Mich. 366; *Johnson v. Shephard*, 35 Mich. 115; *Hess v. Final*, 32 Mich. 515; *Campau v. Traub*, 27 Mich. 215; *McCurdy v. Clark*, 27 Mich. 451.

¹ *Sager v. Tupper*, 42 Mich. 605.

² *Ormsby v. Barr*, 28 Mich. 80; *Lumber Co. v. Williams*, 73 Mich. 86.

³ *Eaton v. Truesdail*, 40 Mich. 1; *Tyler v. Simmons*, 6 Paige, 127;

Slater v. Breese, 36 Mich. 79; *Butterfield v. Beardsley*, 28 Mich. 412; *Suydam v. Duquindre*, Walk. Ch. 23; *Thorne v. Hilliker*, 12 Mich. 215.

⁴ *Eaton v. Truesdail*, 40 Mich. 1.

⁵ *Wright v. Wright*, 37 Mich. 55.

⁶ *Bundy v. Youmans*, 44 Mich. 376; *Barnabee v. Beckley*, 43 Mich. 613; *Lane v. Boom Co.*, 62 Mich. 64. *Slater v. Chapman*, 67 Mich. 523.

⁷ *Boxheimer v. Gunn*, 24 Mich. 372.

⁸ *Abbott v. Mathews*, 26 Mich. 178.

⁹ *Kellogg v. Hamilton*, 43 Mich. 270.

If a party conceives himself aggrieved by an irregularity in the proceedings of the Circuit Court, he should apply to that court for relief, upon a showing that he has sustained, or will sustain, injury therefrom; and, if such application is denied, to then appeal to the Supreme Court from the decision.¹

It is a question how far the court can, on appeal from a later order or decree, interfere with the effect of a prior order not appealed from.² An appeal does not bring up for review proceedings subsequent to the decree appealed from;³ but, while a prior decree is pending, a subsequent decree, made in the court below, without a new hearing on proof, and intended as additional to the prior one, is invalid.⁴ A discretionary order, not in itself appealable, will not be considered collaterally unless it be a plain case of abuse of discretion.⁵

It is said that errors against an appellant on accounting, may be balanced by those in his favor. This is upon the principle that the appeal brings up the whole record, and it may be entirely reviewed by the Supreme Court, and justice done.⁶ But a decree will not be changed in favor of a party who does not appeal, even by way of damages for vexatious appeal.⁷ Where references in the record are made to account books that are not returned in full, and the record does not contain a sufficient transcript of them to enable the court to form an intelligent opinion, the case will be remanded to the lower court, so that the record may be corrected and the case presented in a proper light.⁸ So a case will be remanded for proper proceedings when no regular accounting has been had.⁹ If questions of fact only are involved, and the testimony is conflicting and evenly balanced, the decree will not usually be reversed;¹⁰ and in such a case, heard in open court, the opinion of the circuit judge, who had an opportunity to observe the witnesses, will be given great weight.¹¹ If the pleadings are

¹ *Kellogg v. Putnam*, 11 Mich. 344.

² *Brown v. Brouson*, 35 Mich. 416;
see *Shepherd v. Rice*, 38 Mich. 556;
Damouth v. Klock, 28 Mich. 163.

³ *Kellogg v. Hamilton*, 43 Mich.
269.

⁴ *Beal v. Chase*, 31 Mich. 490.

⁵ *Haines v. Haines*, 35 Mich. 138.

⁶ *Grant v. Bank*, 35 Mich. 515;
Robertson v. Gibbs, 38 Mich. 165.

⁷ *Heath v. Waters*, 40 Mich. 457;
Foster v. Malone, 45 Mich. 255; *Bow-*
man v. York, 106 Mich. 163.

⁸ *Lambert v. Griffith*, 40 Mich. 174.

⁹ *Barnabee v. Beckley*, 43 Mich.
613.

¹⁰ *Green v. Landon*, 28 Mich. 221.

¹¹ *Matter of Wool*, 36 Mich. 299;
Sager v. Tupper, 42 Mich. 605.

good in substance, all matter of form will be disregarded on appeal.' But if the allegations of the bill do not entitle the complainant to any relief, on an appeal by him, the bill will generally be dismissed.²

Jurisdictional defects may be sufficient to reverse a decree notwithstanding they are not pointed out on the argument.³ Especially is this true, if the suit is brought by a public officer and tends to delay the enforcement of a law.⁴ If the court below commits error affecting the rights of infants, the decree will be reversed, even though no specific objection was taken.⁵ It has been held that a decree made without proper notice to a defendant who has appeared, will be reversed.⁶ But there are exceptions to this rule.⁷ Where a party in the absence of fraud, mistake or surprise, has power to apply to the court below for relief, and does not do so, the Supreme Court will not arrest proceedings to aid him.⁸

When a case is taken to the Supreme Court and is considered by that tribunal, its judgment as to all the points and questions presented and decided will forever conclude the parties; and if the case should again be brought before it for review, such questions will not be reconsidered or open for discussion. All such matters will be considered *res adjudicata*.⁹

Supreme Court will not determine facts.—In reviewing a case made, the Supreme Court will not weigh evidence, determine facts, or review the findings of the lower court upon questions of fact. It is only where there is a total want of evidence, or where the findings are contrary to the undisputed evidence, that the facts found by the trial court can be overturned.¹⁰

¹ *Dye v. Mann*, 10 Mich. 291; *Phillips v. Stanch*, 20 Mich. 369.

² *Hulburt v. Britain*, 2 Doug. 191.

³ *Fessenden v. Hill*, 6 Mich. 242; *Farrell v. Taylor*, 12 Mich. 113; *Smith v. Smith*, 13 Mich. 258; *Youngblood v. Sexton*, 32 Mich. 407.

⁴ *Youngblood v. Sexton*, 32 Mich. 407. See also, on jurisdiction, *Lockwood v. Moliter*, 26 Mich. 444; *Campbell v. Quackenbush*, 33 Mich. 289.

⁵ *Smith v. Smith*, 13 Mich. 258.

⁶ *Jenney v. O'Flynn*, 5 Mich. 215.

⁷ *Evans v. Norris*, 6 Mich. 70; *Kellogg v. Putnam*, 11 Mich. 344; *Mich. Ins. Co. v. Whittemore*, 12 Mich. 427.

⁸ *Campau v. Campau*, 19 Mich. 130.

⁹ *Smyth v. Neff*, 123 Ill. 310; *Rising v. Carr*, 70 Ill. 596; *Newberry v. Blatchford*, 106 Ill. 584; *Mix v. The People*, 122 Ill. 641.

¹⁰ *Crugin v. Gardner*, 65 Mich. 400; *Wertin v. Crocker*, 47 Mich. 642; *Chatterton v. Parrott*, 46 Mich. 432; *Tuxberry v. French*, 39 Mich. 190; *Clark v. Phelps*, 76 Mich. 564.

The only questions reviewable on appeal or writ of error and bill of exceptions are those of law, which have been passed upon by the trial court.¹ And the weight to be given to the evidence supporting the facts as found is not within the province of the appellate court.²

Where no exceptions are taken to the findings of fact to the circuit judge, the appellate court can not review the facts found, nor determine whether the findings are supported by the evidence.³

SECTION II.

RULES OF THE SUPREME COURT.

RULE 1. Clerk to endorse time of filing papers—Not to permit them to be taken from files.—The clerk of this court shall reside and keep the office at the city of Lansing, and he shall not practice either as attorney or counselor in this court, or in any other court while he shall continue to be clerk of this court. He shall endorse on every paper the day on which the same is filed, and shall not permit any original record or paper to be taken from the court room or from the office without an order from the court or by the permission of one of the justices thereof; but parties interested in any such may inspect the same in his office, and take copies thereof.

RULE 2. Clerk's fees.—The clerk shall be entitled to six dollars upon entering any case in the Supreme Court, which amount shall be in full for all fees in such case. Provided, that an additional sum of two dollars shall be paid to the clerk upon the entry of any motion upon the motion docket, except in cases of *mandamus*, where the motion fee shall be four dollars.

The foregoing fees may be taxed by the prevailing party where costs are allowed by order of the court. The clerk shall also be allowed the sum of fifteen cents per folio for certified copies of any entries or papers in any suit or proceeding when

¹ *Turnbull v. Richardson*, 69 Mich. 400.

² *Lumber Co. v. Williams*, 73 Mich. 86; *Printing Co. v. Perkins*, 73 Mich. 624.

³ *Peabody v. McAvoy*, 23 Mich. 526; *Haines v. Saviers*, 93 Id. 440; *Child v. City*, Id. 503; *Dodge v. Kennedy*, 93 Mich. 547.

required for any other purpose than for one connected with the progress or disposition of such suit or proceeding.

The clerk's fees for all proceedings relating to the admission of any person to the bar, including the proper certificate, shall be the sum of two dollars.

RULE 3. Entitling of causes, etc.—Hereafter, in all cases brought to this court for the purpose of reviewing or revising the judgment, order, decree or action of any other court, tribunal or officer, the relative position of the parties and their designation as plaintiffs, petitioners, defendants or respondents shall be the same in this court as in the court, or before the tribunal or officer whose action is in question; but they may further be designated as appellants or appellees.

RULE 4. Writs of error and certiorari, and notice thereof.—Writs of error and *certiorari* shall be tested of the day when issued, and shall be made returnable at the office of the clerk of this court, on a day certain, either in vacation or in term, not less than ten days, nor more than forty days from the issuing thereof.

RULE 5. The appellant shall cause notice of the issuance, and the date and return day of the writ, to be served on the adverse party or his attorney in the court below, within ten days after the issuance thereof; and an affidavit of such service shall be filed in the clerk's office on or before the return day thereof.

RULE 6. When return of writ of error, etc., to be filed.—The appellant shall cause the writ of error or *certiorari*, with a return containing a transcript of the record or proceedings in the court below, to be filed in the clerk's office on or before the return day mentioned in such writ.

RULE 7. Time for returning writ may be extended.—The time for returning a writ of error or *certiorari* may be extended by one of the justices of the Supreme Court, or a circuit judge, for good cause shown, and the order granting such extension shall be returned with the other papers to the clerk of this court, and the time fixed by such order for the return shall be treated in all respects as if it had been the original return day. Such extension shall be had only upon proper notice to the adverse party.

RULE 8. When defendant in error may move to dismiss

for want of prosecution.—If the appellant fails to have the writ of error or *certiorari* returned on or before the return day thereof, or to assign errors and serve copies of such assignment, within the time allowed for that purpose, or in cases of appeals in chancery shall fail to file the record and proceedings in the court below within forty days after the filing and approval of the appeal bond, the appellee may move the court to have the writ of error or *certiorari* dismissed for want of prosecution, or the appeal entered and dismissed for want of prosecution, as the case may be.

RULE 9. Court may grant or deny motion to dismiss on terms.—When a motion is made to dismiss a writ of error or *certiorari*, or to enter and dismiss an appeal for want of prosecution, the court may grant or deny the same on such terms and conditions as the justice of the case may require.

RULE 10. Joint parties proceeding severally.—In case where the writ of error shall be brought by one or more of several parties, such party shall, at least fifteen days before filing his præcipe for writ of error, serve upon the other parties against whom the judgment has been entered, a notice of his intention to apply for a writ of error; the parties upon whom such notice is served shall, within ten days thereafter, serve notice on such party of their intention to join in such writ of error, or, in default thereof, on filing of præcipe for the writ of error and proof of service of such notice, a rule may be filed granting such parties leave to prosecute such writ of error severally.

RULE 11. Assignment of error, and service of copy.—The party suing out a writ of error shall have ten days after the return day mentioned therein within which to assign error in cases where no bill of exceptions is settled. Every assignment of error on such writ shall be special, and no judgment or proceedings shall be reversed or annulled for any other defect or error than such as shall be thus specially assigned. Copies of assignments of error and of all pleadings which may be filed in the Supreme Court, shall be served within the time limited for filing the same. Provided, that it shall not be necessary to file, serve and give notice of assignments of errors already provided for by Circuit Court Rule 47.

RULE 12. Certiorari to review mandamus.—When in any

case any Circuit Court shall allow or deny a writ of *mandamus*, the party feeling himself aggrieved by such decision, may make application to one of the justices of this court for the allowance of a writ of *certiorari*, and, if the same shall be allowed, the cause, when returned into this court, may be noticed for hearing as a motion by either party on any motion day thereafter, unless otherwise ordered.

RULE 13. Proceedings in mandamus.—In proceedings for *mandamus* where an order to show cause has been made, the respondent must answer fully every material allegation of the petition; and every material averment not so answered may be taken admitted by the respondent to be true as alleged. And in case no answer is made and filed as required by such order, the court upon due proof of service of the order, will award a peremptory *mandamus* as prayed for, or enforce obedience to the order by process of contempt.

RULE 14. Notice of appeal in chancery.—In chancery appeals the appellant shall, within twenty days after perfecting his appeal, give notice of such appeal, and of the time when the appeal bond was filed; which notice shall be served on all of the other parties, whether joint or adverse, who have appeared in such cause, by serving a copy of such notice on such parties or their solicitors in the court below; and a copy of such notice, with proof of service thereof, shall be filed in the clerk's office within ten days after such service.

RULE 15. Return to appeal in chancery—Motion to dismiss appeal.—In all cases of appeal in chancery, the register shall transmit the record and proceedings in the court below to the clerk of the Supreme Court within forty days after the filing of the appeal bond in such case.

RULE 16. Extension of time for return.—The time for returning the record in an appeal case may be extended by one of the justices of the Supreme Court, or a circuit judge, for good cause shown, and the order granting such extension shall be returned with the other papers to the clerk of this court. Such extension shall be had only upon proper notice to the adverse party.

RULE 17. Practice on cases made.—Cases made may be filed with the clerk of this court, and the party removing the case to this court, shall cause notice of such filing to be given

to the adverse party or his attorney in the court below, within ten days after such filing, and shall file proof of such service with the clerk of this court.

RULE 18. Rule to plead.—At the time of filing an information in the nature of a *quo warranto*, the attorney-general shall file with the clerk of this court a rule requiring the respondent to plead to such information within twenty days after service upon him of the summons, and a copy of such information, together with a copy of such rule.

RULE 19. Plea.—The respondent shall plead to such information within twenty days after service upon him of such summons and a copy of such information, together with a copy of such rule, and in default thereof judgment by default may be entered.

RULE 20. Replication.—Within fifteen days after filing and serving such plea, replication shall be filed thereto, when such cause shall be deemed to be at issue.

RULE 21. Notice to be in writing—How to be served—How served to bring party into contempt.—All notices shall be in writing, and shall be served on the attorney or solicitor in the cause, where a party who is also an attorney of this court shall prosecute in person, or, if the defendant shall give notice that he is an attorney, and will defend in person, all notices and other papers shall be served on him in like manner; and where the object is to bring a party into contempt for disobeying any rule or order of the court, the service shall be on such party personally, unless otherwise ordered by the court.

RULE 22. Notices and papers may be served on an attorney or solicitor as follows: (a) By delivering the same to him personally. (b) By leaving the same in his office with his clerk, or with a person having charge thereof. (c) When no person is to be found in his office by leaving the same between the hours of six in the morning and nine in the evening in some suitable and conspicuous place in such office. (d) If the office be not open so as to admit of service therein, then by leaving the same at the residence of the attorney or solicitor with some person of suitable age and discretion. (e) By depositing the same in a postoffice inclosed in a sealed envelope, plainly addressed to such attorney or solicitor at his place of business

(according to the best information and belief of the person making the service), with postage thereon fully prepaid.

RULE 23. Such service by mail shall be lawful where the attorney or solicitor resides in the same city, village or township, as well as where he resides in a different city, village or township. In case of service by mail, the time of service shall be increased one day for every one hundred miles distance, or fraction thereof, between the place of deposit and the place of address.

RULE 24. Service when party appears in person—No service necessary when defendant does not appear.—Where a party other than an attorney of this court, prosecutes or defends in person, the service of notices and papers shall be made in the same manner as provided in this rule. And no service of papers in the ordinary proceedings in a case shall be necessary to be made on a defendant who has not appeared therein.

RULE 25. How time computed on service of papers, and on orders, etc.—The day on which any rule shall be entered, or order, notice, pleading or paper served, shall be excluded in the computation of the time for complying with the exigency of such rule, order or notice, pleading or paper, and the day on which a compliance therewith is required shall be included, except where it shall fall on Sunday, in which case the party shall have the next day to comply therewith. When by the terms of any order an act is directed to be performed instantan, it shall be done within twenty-four hours.

RULE 26. In all cases where service of papers can not reasonably be made on account of the lack of an attorney of record, or the inability to find a party, or on account of the absence of the attorney of record from his usual place of abode, residence or office, or for any other reason, this court, or one of the justices thereof, upon an *ex parte* application, on cause shown, may direct in what manner and on whom service may be made.

RULE 27. Practice on motions.—All motions to the court shall be reduced to writing and filed with the clerk, and shall contain a brief statement of the grounds and objects of the motion.

Fifteen minutes on each side shall be allowed for the argument of a motion, and no more, without special leave of the

court granted before the argument begins, and only one counsel shall be heard on a side. Provided, that no oral argument shall be allowed on an *ex parte* application, or on any application for extension of time to sue out a writ of error, or to make return to a chancery appeal.

RULE 28. Notice of the arguments of motions together with copies thereof, and the affidavits on which they are based, shall be served on the opposite attorney at least four days before the time noticed for hearing the same, unless the attorney for the adverse party resides outside the city of Lansing, in which case the time of service shall be increased one day for every additional one hundred miles, or fraction thereof, distance between his place of residence and the city of Lansing.

RULE 29. The motion day shall be Tuesday of each week, on which day motions shall have preference over calendar causes; and all special motions shall be noticed for one of these days. They shall be heard on the day for which they are noticed, unless adjourned over to a subsequent motion day, or unless there is not time to hear the same on the day for which they are noticed, in which case they shall be heard on the next or succeeding days.

RULE 30. In addition to oral arguments, each party shall submit a printed or type-written brief at the time such argument is made.

RULE 31. The clerk shall keep a motion docket, and shall enter the motions filed under this rule on said docket in the order in which they are delivered to him, and will, on the opening of the court on motion days, present such docket to the court. Motions will be called for argument in their order, and no motions will be entertained unless brought forward as provided by these rules.

RULE 32. Time of service—How shortened or extended.—The time limited by these rules for making motions or applications, or giving any notice, or taking any action, may be shortened or extended in any case by the court or any justice thereof, unless such time is limited by statute.

RULE 33. Agreements to be in writing.—No private agreement or consent between the parties or their attorneys in respect to the proceedings in a cause shall be binding, unless evidence thereof shall be in writing, subscribed by the party

or his attorney, against whom the same shall be alleged and filed in the office of the clerk.

RULE 34. Notice of hearing.—After the record of an appeal case has been filed, and the time for filing the same has elapsed, and after the filing of a case made or the return to a writ of error, or issue joined in cases requiring a formal issue, either party may notice the cause for hearing; said notice shall be given at least thirty days before the first day of the term at which the argument is desired.

RULE 35. The party removing a cause into the Supreme Court by writ of error, appeal, *certiorari*, case made or otherwise, shall prepare a printed record for the use of court and counsel, which shall contain all of the testimony and so much of the pleadings, record and proceedings (and no more) as are necessary to present the questions raised. All records, arguments and briefs printed for the use of this court shall be in small pica type, twenty-four pica “ems” to a line, thirty-five lines to a page, leaded with four-to-pica leads. The record shall have a suitable cover containing the title of the court and cause, and the court from which the case is brought into this court; the size of the pages of the records and briefs to be nine and one-quarter by six and one-quarter inches.

RULE 36. The record shall contain a complete index of the names of the witnesses whose testimony appears in such record, and the pages whereon the examination, cross-examination, or re-examination is found; also the pages whereon any exhibit appears and in cases at law the page of the record where any exception relied on may be found.

RULE 37. Records — Printed case — Service of copy.—Whenever any record in a case at law, brought up on writ of error or case made, is so prolix as to cause vexation by reason of the multiplicity of frivolous assignments, or by any other abuse, it shall be within the direction of the court to grant such costs against the prevailing party who is responsible for such abuse, as may offset, in whole or in part, the costs to which he would otherwise be entitled.

RULE 38. In all cases the appellant shall cause the record to be printed as soon as practicable after the filing of the return in this court; and as soon as the printing is completed, the appellant shall serve on the appellee at least two copies of the

printed record, and, before the first day of the term at which the cause shall be noticed for argument, the appellant shall file with the clerk of this court, at least twelve printed copies thereof. In any case the appellant shall cause the printed record to be served upon the appellee within thirty days after the filing of the return in this court and within the time allowed by rule for the service of the first brief, unless further time therefor shall be granted. Provided, that this shall not be construed to give to the appellant thirty days in every case, but only so much time as is reasonably necessary after the filing of the return in this court.

If the appellant shall fail to print and serve the record within the time above required, or within such further time as shall be granted on motion, the court may, on motion of the appellee, dismiss the case and award costs to the appellee, or further time may be granted for compliance with said requirements, on such terms as shall be proper. If the appellants shall fail to have the printed record filed before the first day of the term for which the cause is regularly noticed for argument, the cause shall be stricken from the calendar on the first day of the term, and further dealt with as justice may require.

RULE 39. Two copies of the printed record and brief shall be served on the attorney-general in all state or criminal cases at least twenty days before the first day of the term at which such cause is to be heard.

RULE 40. Printed briefs.—The brief of a party bringing a cause into this court shall contain a clear and concise statement of the facts in the case, distinct from argument, and of the errors upon which he relies, the questions involved, and the manner in which they are raised. The court will consider such statement sufficient and accurate, unless the opposite party shall point out in his brief wherein the statement is insufficient or inaccurate.

RULE 41. Two copies of the appellant's brief shall be served upon the appellee as soon as printed, and at least twenty days before the first day of the term at which the cause is regularly noticed for hearing. Two copies of the appellee's brief shall be served upon the appellant as soon as printed, and at least five days before the first day of the term at which the cause is regularly noticed for hearing. Provided, however, that if

the printed record and appellant's brief shall be served thirty days before the first day of the term, the appellee's brief shall be served at least fifteen days before the first day of the term. In chancery appeals when the complainant is also appellant, the foregoing shall apply. In chancery appeals heard on pleadings, or on pleadings and proofs, when the complainant is appellee, his brief shall be served on the defendant at least fifteen days before the first day of the term at which the cause is regularly noticed for hearing (or within ten days after service of the printed record by appellant, if the same is not served at least twenty days before the first day of the term), and the appellant's brief shall be served at least five days before the first day of the term (or within ten days after the service of complainant's brief).

The briefs above mentioned shall fairly present the cause on each side. Supplemental briefs may be printed and served at any time before the cause is placed upon the call for argument, but subsequently by special permission of the court only. If the brief of either party is not served within the time above required, the opposite party may, at his option, on the first day of the term, have the cause placed at the foot of the calendar or continued, and the court may, in proper cases, order the payment of a counsel fee by the party in default.

RULE 42. Twelve copies of all briefs shall be filed at least forty-eight hours before the case has been placed on call; and no oral argument shall be heard on behalf of a party failing to comply with this provision.

RULE 43. What are calendar causes, and when to be noticed.—Writs of error and *certiorari*, appeals in chancery, cases made, bills of exceptions in criminal cases, and all other cases which are to be heard on the merits, are calendar causes, and to be heard at any term must be placed on the calendar for that term. Criminal cases may be placed on the calendar during the first two weeks of term by consent of the attorney-general.

RULE 44. How causes placed on calendar—Notice to the clerk—Grouping cases by stipulation—Motion for continuance.—The priority of causes on the calendar, as first made, shall depend upon the date of filing notice of hearing with the clerk. The party noticing a cause for hearing shall, at

least twenty days before the first day of the term for which the same is noticed for hearing, give notice to the clerk to place such cause on the calendar for the term. No cause shall be entered on the calendar by the clerk until the return, record on appeal, case made, or exceptions in criminal cases shall have been filed in this court, nor without the notice to the clerk hereinbefore mentioned. Upon filing stipulation with the clerk, on the forenoon of the first day of the term, cases may be placed lower down on the calendar and grouped to suit the convenience of counsel. After such re-arrangement of causes by the clerk, no further changes can be made by counsel, except to continue or place at the foot of the calendar. In cases where counsel are not present in court, notice of motions for continuance, to be heard on the first day of term, shall be given at least twenty-four hours previous thereto, and if for any subsequent day, two days' notice shall be given.

RULE 45. Call of calendar case twice passed to be continued.—The court, on the first day of each term after motions are disposed of, will commence calling the cases for argument in the order in which they stand on the calendar as re-arranged, and proceed from day to day during the term in the same order, and if the parties, or either of them, shall be ready when the case is called, the same will be heard; and if neither party shall be ready to proceed in the argument, the cause will go over the term, unless the court, on cause shown, shall order otherwise. Fifteen cases only shall be considered liable to be called on each day during the term, including the one under argument, if the same shall not have been concluded on the preceding day. No cause shall be taken up out of its order, or set down for a particular day, except under special and peculiar circumstances, to be shown to the court. On motion days motions will take precedence of calendar causes.

RULE 46. Time allowed counsel on argument.—In the argument of calendar causes two counsel may be heard on a side. The time allowed for argument on each side shall not exceed one hour, unless by special permission of the court, on cause shown, granted before argument begins.

RULE 47. Any cause may be submitted upon briefs by stipulation at any time.

RULE 48. Expense of printing to be taxed as disburse-

ments.—The necessary expense of printing the record and brief required by these rules, may be taxed as disbursements in favor of the party prevailing in the cause.

RULE 49. Costs — What counsel fee to be taxed.—A counsel fee shall be awarded to the prevailing party, unless otherwise ordered by the court (except in criminal cases) in addition to such other costs as such party may be entitled to, as follows: (a) On motions which do not finally dispose of the case, ten dollars. (b) On *mandamus* and *certiorari*, heard as motions, fifteen dollars. (c) On motions which finally dispose of the case, twenty dollars. (d) On calendar causes, thirty dollars.

RULE 50. Costs shall be taxed by the clerk upon notice of not less than four days. If the party upon whom such notice is served shall reside outside the city of Lansing, the time of service of such notice shall be increased one day for every additional one hundred miles distance, or fraction thereof, between his place of residence and the city of Lansing; provided, that no notice need be given of more than ten days. Such notice shall be accompanied by a copy of the bill proposed to be taxed and the affidavits to be read in support thereof.

RULE 51. Application for rehearing—Printing of reasons, etc.—Service of copy, etc.—Motion fee.—No application for a rehearing will be considered by the court unless the moving party, at as early a date as may be practicable, shall cause any papers upon which it is based, together with his reasons for the granting of the same, to be printed, and twelve copies thereof to be filed with the clerk of the court, nor unless a copy thereof shall be served upon the counsel for the opposite party. Proof of this service shall also be filed with the clerk, and the court, after the expiration of not less than four days from such service, will examine the papers, and, without further argument, unless specially ordered; will pass upon the application. The party opposing will be at liberty to file with the clerk his objections to the application, either printed or type-written, as he may prefer, at any time before the application is decided. In motions for rehearing, if denied, the opposing party shall be entitled to tax a motion fee of fifteen dollars, and the expense of printing a brief, if one has been furnished.

RULE 52. Final process on judgment or decree.—Final process to which any party may be entitled upon a judgment or decree of this court, shall be issued by the clerk, and made returnable not less than twenty, nor more than ninety days from the time of its issue.

RULE 53. Suggestion of death—Assignment of errors—Scire facias.—When, after the death of one party to a judgment without survivors, and before his representatives have revived the same, the adverse party sues out a writ or error from this court, no notice need be given of such issue until the same is returned. But the appellant, or the representatives of the adverse party to the judgment may, at any time after such return, file an affidavit of such death, and of the appointment of such representatives, and thereupon suggest the same of record, and the time for assigning errors, except as provided in Circuit Court Rule 47, shall not begin to run until said appellant shall make such suggestion, or until he is notified of such suggestion, if made by such representatives.

RULE 54. These rules shall take effect January 1, 1897, as to all causes commenced on or after that date, and also as to any cause removed to this court previous to that date as far as concerns proceedings therein, subsequent to the date when the same shall be ready to be noticed for argument. All rules not herein contained are hereby repealed, except as above provided.

SECTION III.

WRITS OF CERTIORARI.

Certiorari is the name of a judicial writ issued by a superior court, directed to one of an inferior jurisdiction, commanding the latter to certify and return to the former the records in the particular case.¹

Common law writ.—The only office which the common law writ of *certiorari* performs is to cause the record of a proceeding to be certified from an inferior to a superior tribunal. Upon the service of the writ it becomes the duty of the infe-

¹ Bouv. L. D.; *Deer v. Com'rs of Highways*, 109 Ill. 379.

rior tribunal to which it is directed, to transmit a full and complete transcript of the record and proceedings of which complaint is made, to the court awarding the writ. Nothing outside of the record should be certified, but simply the record itself. Upon the return of the writ the cause is tried solely upon the record; and allegations in the petition of matters outside of the record will not be considered. No trial can be had upon any issue of fact. When the return is sufficient the court will determine, upon the record alone, whether the inferior tribunal has jurisdiction of the parties, and of the subject-matter, and whether it had exceeded its jurisdiction, or otherwise proceeded in violation of law.

If the writ is improperly issued, the defendant may move to quash it; and the court will quash it, even after return, and on a hearing of the merits.¹

The statute provides that all writs of *certiorari*, to correct errors in proceedings that are not according to the course of the common law, shall be issued out of and be made returnable to the Supreme Court, according to the practice heretofore established, and subject to such regulations as shall from time to time be made by the general rules of the Supreme Court.²

Writs of *certiorari* may be taken out of the clerk's office. They are to be tested of the day when issued, and made returnable on a day certain, either in vacation or in term, not less than ten days, nor more than forty days from the issuing thereof. The appellant must cause a notice of the issuing and date and return day of the writ to be served on the adverse party or his attorney in the court below within ten days after the issuance thereof, and an affidavit of such service shall be filed in the clerk's office on or before the return day thereof.³

Return to the writ.—The appellant must cause the writ, with a return containing a transcript of the record or proceedings in the court below, to be filed in the clerk's office on or before the return day mentioned in such writ.⁴

By whom allowed.—Writs of *certiorari* may be allowed by any justice of the Supreme Court, or judge of the Circuit

¹ *Ennis v. Ennis*, 110 Ill. 78; 1 How. Pr. 479; 2 Green's New Pr. 854.

² How. Stat. § 8691; see 2 Greene's New Tr. 847-857.

³ See Supreme Court Rules 4 and 5, *ante*, page 688.

⁴ See Supreme Court Rule 6, *ante*, page 688.

Court, or circuit court commissioner.¹ The power of the commissioner for this purpose is statutory, and is not confined to proceedings in his own county.²

Limitations.—No writ of *certiorari* shall be issued to correct any proceedings, unless such writ be brought within the same time after such proceedings shall have been had as is limited for bringing a writ of error upon a judgment.³ The time allowed for writs of error is one year.⁴

Delay in applying for the writ until new rights and interests have intervened which would be prejudiced by its allowance, may be a sufficient cause for denying the writ, although the one year may not have expired. The statute requiring the writ to be issued within one year does not take away the discretion of the court as to its allowance.⁵

When allowed.—The common law writ of *certiorari* is not one of right, but rests in the discretion of the court, to be allowed or not, as may best promote the ends of justice.⁶ The writ will issue from the Supreme Court only when it is necessary to prevent a failure of justice; and will not be allowed when the equities are against it.⁷ It should be granted sparingly where other adequate remedies can be had. And when jurisdictional questions, as well as those arising on the merits, can be fully disposed of on an appeal, it should not be allowed unless under circumstances which show that a failure of justice will result from denying it; nor will the writ be allowed unless it is made to appear that the plaintiff has some substantial interest which will suffer if it is denied;¹⁰ nor

¹ How. Stat. § 8692; *Zook v. Blough*, 42 Mich. 487.

² *Loder v. Littlefield*, 39 Mich. 374.

³ How. Stat. § 8693; *Wilson v. Gifford*, 42 Mich. 456.

⁴ How. Stat. Supp. § 8686.

⁵ *Wilson v. Gifford*, *supra*; *City v. Murphy*, 95 Ill. 531.

⁶ *Matter of Lantis*, 9 Mich. 324; *Farrell v. Taylor*, 12 Mich. 113; *Specht v. Detroit*, 20 Mich. 168; *Roediger v. Drain. Commissioners*, 40 Mich. 745; *Kimball v. Homan*, 74 Mich. 699.

⁷ *Adams v. Abram*, 38 Mich. 302; *Withington v. Southworth*, 26 Mich. 302.

⁸ *Roediger v. Drainage Commissioners*, *supra*.

⁹ *Farrell v. Taylor and Specht v. Detroit*, *supra*.

¹⁰ *People v. Leavitt*, 41 Mich. 470; see *Hinman v. Eakins*, 26 Mich. 80; *Burnham v. Van Gilder*, 34 Mich. 246; *Cheney v. Russell*, 44 Mich. 620; *Dunning v. Drain. Commissioners*, 44 Mich. 518; *Wolpert v. Newcomb*, 106 Mich. 357.

will relief be granted to plaintiff for errors that do not affect him.¹

Questions of law only considered.—The office of the writ of *certiorari* is to review questions of law, and not questions of fact; nor is the weight of evidence considered; but the testimony may be examined merely to ascertain if there was any evidence to support the proceeding. And the correctness of the rulings upon the admission or rejection of evidence may be reviewed.²

Who may prosecute the writ.—A person whose rights are injuriously affected, although not formally and technically an original party to the record, may prosecute the writ.³

Parties defendants.—The persons or tribunal whose action is sought to be reviewed, and in whose hands the record of such action or proceeding remains, are the proper parties to whom the writ should be directed.⁴ It should be directed to the officer who controls the record to be certified.⁵

Space in this work will not permit the giving of forms in this proceeding. For forms, see Puterbaugh's Com. L. Pl. and Pr.; 2 Green's New Pr. 1153, 1154, 1484, 1496.

SECTION IV.

HABEAS CORPUS AND CERTIORARI.

Habeas corpus—History and nature of the remedy.—The writ of *habeas corpus* is an ancient English writ, used for a variety of purposes from a remote antiquity. One of the purposes for which it was used was to recover freedom which had been wrongfully taken away. Personal liberty was

¹ *Davison v. Otis*, 24 Mich. 23; see *Morgan v. Mich. Air Line R. R. Co.*, 57 Mich. 431, 437; *McComb v. Prentis*, *Ib.* 225.

² *Jackson v. People*, 9 Mich. 111; *Hyde v. Nelson*, *Ib.* 353; *Linn v. Roberts*, 15 Mich. 443; *Brown v. Blanchard*, 39 Mich. 790; *Bank of Fenton v. Whittle*, 41 Mich. 365; *Schall v. Bly*, 43 Mich. 401.

³ *Campau v. Button*, 33 Mich.

523; *Palmer v. Kalamazoo, etc.*, 83 Mich. 528.

⁴ *Goodrich v. Com'rs of Highways*, 1 Mich. 385; *French v. Com'rs of Highways*, 12 Mich. 267; *Crawford v. Scio*, 22 Mich. 405; *Roberts v. Com'rs Cottrellville*, 24 Mich. 182; *Wilson v. Gifford*, 41 Mich. 417.

⁵ *Whistler v. Wilson*, 39 Mich. 121; *Jaquith v. Hale*, 31 Mich. 430; *Comfort v. Stockbridge*, 37 Mich. 472.

always asserted by the common law from its earliest ages; and it was always assailed by kings who would be tyrants, and with an earnestness proportioned to their tyranny. Hence, it became necessary to declare this principle in the most solemn manner in Magna Charta (A. D. 1215). But before the 31st year of the reign of Charles II. (A. D. 1679), its benefits were in a great degree eluded by time-serving judges, who awarded it only in term time, and who assumed a discretionary power of awarding or refusing it. The writ was evaded by courts and sheriffs who were disposed to support royal and ministerial usurpations; and it became so powerless, that early in the reign of Charles I. (1626), the Court of King's Bench formally decided that it had no power to release any person imprisoned without any cause assigned if he was imprisoned by the express command of the king, or by the lords of the privy council. The petition of rights, of the third year of the reign of Charles I. (A. D. 1628), asserted the illegality of this decision, and declared that "no freeman should be imprisoned or detained without cause shown, to which he may make answer according to law." But the means of enforcing this rule were still imperfect, and personal liberty was still violated; and by 16 Charles I. Chap. 10 (A. D. 1641), various provisions were enacted, intended to make the writ of *habeas corpus* more effectual. But this was not enough. The judges still continued to refuse the writ at their pleasure; and prisoners were sent to distant jails, and sheriffs and jailers refused to obey it; or if the person imprisoned was brought before an examining court, his liberty was still denied him on frivolous pretenses. To secure the full benefits of the writ to the subject, the statute of 31 Charles II., Chap. 2 (1679), commonly called the *habeas corpus* act, was passed. This gave to the writ the vigor, life and efficacy requisite for the due protection of the liberty of the subject. This act consisted of a variety of provisions, devised with so much skill, and so well adapted to give each other mutual support, that it may safely be asserted that personal liberty will be safe, in England and the United States, so long as this law remains in force. Evasion of it is almost impossible, and it can be made ineffectual only by a positive and open violation of its essential provisions, or by a distinct denial of its interposition. The enactment of this great "pal-

ladium" of English liberty was secured after persistent efforts on the part of Lord Shaftesbury and other friends of liberty in Parliament.

The *habeas corpus* act has been substantially incorporated into the jurisprudence of every State in the Union, and the right to the writ has been secured by the constitution of most of the States, and by that of the United States.

The Constitution of the United States, Art. 1, Sec. 9, Par. 2, declares, that "the privilege of the writ of *habeas corpus* shall not be suspended, unless when, in case of rebellion or invasion, the public safety may require it." Sec. 44, of Art. IV of the Constitution of Michigan declares, that "the privilege of the writ of *habeas corpus* remains, and shall not be suspended by the legislature, except in case of rebellion or invasion the public safety require it."

Who entitled to the writ.—Every person committed, detained, confined or restrained of his liberty within this State, for any criminal or supposed criminal matter, or under any pretense whatsoever, except in cases otherwise specified in the statute, may prosecute a writ of *habeas corpus* or of *certiorari*, according to the provisions in the statute contained, to inquire into the cause of such imprisonment or restraint.¹

Who not entitled to the writ.—The cases excepted by the statute, of persons who are not entitled to prosecute such writ, are: 1. Persons committed or detained by virtue of any process issued by any court of the United States, or any judge thereof, in cases where such courts or judges have exclusive jurisdiction under the laws of the United States, or shall have acquired exclusive jurisdiction by the commencement of suits in such courts. 2. Persons committed for treason or felony, or for suspicion thereof, or as accessories before the fact to a felony, where the cause is plainly and specially expressed in the warrant of commitment. 3. Persons convicted, or in execution, upon legal process, civil or criminal. 4. Persons committed on original process in any civil action on which they were liable to be arrested and imprisoned, unless when excessive and unreasonable bail is required.²

In what cases granted.—The writ is to be granted when-

¹How Stat. § 8554.

²How. Stat. § 8555; see *Matter of Spangler*, 11 Mich. 298.

ever a person is in actual custody, confined or restrained of his liberty, under any color or pretense whatever. Every restraint upon a man's liberty is, in the eye of the law, an imprisonment, wherever may be the place, or whatever may be the manner in which the restraint is effected.¹ Words may constitute an imprisonment, if they impose a restraint upon a person, and he is accordingly restrained and submits.² Whenever a person is deprived of going when and where he pleases, he is restrained of his liberty, and has a right to inquire if that restraint, whether by a sheriff, constable, or private individual, is illegal and wrongful. It is not necessary that the degradation of being incarcerated in a prison should be undergone to entitle any citizen, who may consider himself unjustly charged with a breach of the laws, to a hearing.³

It lies to determine the question of the right to the custody of a child;⁴ and at the instance of a husband for the deliverance of the wife. In these and like cases the right to the writ exists at the common law.⁵ It lies to test the validity of an arrest on *capias ad respondendum*;⁶ and is the proper remedy for a conviction without jurisdiction.⁷

The writ runs into insane asylums, and lies to review the order of probate courts committing persons to such asylums.⁸

Application for writ, how made.—Application for such writ may be made by petition signed either by the party for whose relief it is intended or by some person in his behalf.⁹

Although the person imprisoned has an undoubted right to make the application, it is not necessary that it should proceed directly from him. It may be made by an agent, or friend, on behalf of the prisoner;¹⁰ or by a wife on behalf of her husband; or a husband on behalf of his wife;¹¹ and it is held

¹ Hurd on Hab. Corp. 209; 1 Kent, 631; 2 Inst. 482.

² *Ib.*; Butler's N. P. 62.

³ Hurd on Hab. Corp. 210.

⁴ *In Matter of Petition of Farrier*, 103 Ill. 367; *People v. Turner*, 55 Ill. 280; 1 Green's New Pr. 677.

⁵ 1 Green's New Pr. 677; 1 Duer (N. Y.) 714, 715.

⁶ *Miller v. Rosier*, 31 Mich. 475; *In*

the Matter of Smith, 16 Ill. 347; *The People v. Hanchett*, 111 Ill. 90.

⁷ *Hamilton's case*, 51 Mich. 174.

⁸ *Palmer v. Kalamazoo, etc.*, 83 Mich. 528.

⁹ Public Acts 1889, page 63; How. St. Supp. § 8556.

¹⁰ 14 How. St. Tr. 814.

¹¹ Hurd on Hab. Corp. 211; 10 Eng. L. & Eq. 318; 4 Burr. 1991; 1 Burr. 606; 8 Paige, 47.

that it may be made by any person.¹ Whenever the application is made by a third person, it is supposed to be made in accordance with the wishes of the person restrained of his liberty, and is allowed to prevent delay, where the latter is represented to be under any disability, or in any manner prevented from making the application in his own right.² But mere volunteers, who do not appear on behalf of the prisoner, or show some right to represent him, will not be heard.³

To whom made.—The application may be made to the Supreme Court during its session; to the Circuit Court, or the circuit judges thereof, of the county where the prisoner is detained; to any municipal court of record, or the judge thereof, of any city where the prisoner is detained; or if there be no such municipal court within the city, or the judge thereof be absent from the city, and the circuit judge shall be absent from the county, or for any cause be incapable of acting, or having refused to grant the writ, then application may be made to the Circuit Court or to the circuit judge of an adjoining county.⁴

The Supreme Court will not review on writ of error, a case of *habeas corpus*, heard before a circuit judge at chambers;⁵ but if the case is heard before the Circuit Court, a writ of error is the proper remedy.⁶ If it is desired that the Supreme Court should consider the evidence in a *habeas corpus* case, the party must apply to that court for his writ.⁷

Circuit court commissioners have no power under Art. 6 of the Constitution to adjudicate under *habeas corpus* upon grounds involving judicial action.⁸

The petition—How verified.—The petition should state in substance:

1. That the person in whose behalf the writ is applied for, is imprisoned or restrained of his liberty; the officer or person by whom he is so confined or restrained, and the place

¹ 13 East, 195; Dudley (Ga.) 42.

² Hurd on Hab. Corp. 212.

³ 3 Burr. 1363; 24 Eng. L. & Eq. 259; 1 Cush. 385.

⁴ Public Acts 1889, No. 59, page 63; How. St. Supp. § 8556.

⁵ *Faust v. Judge of Calhoun Circuit*, 30 Mich. 266.

⁶ *Matter of Hicks*, 20 Mich. 129.

⁷ *Corrie v. Corrie*, 42 Mich. 509.

⁸ *Buddington's case*, 29 Mich. 472; *Burger's case*, 39 Mich. 203; *Rowe v. Rowe*, 28 Mich. 353.

where; naming both parties, if their names be known, or describing them, if their names be not known;

2. That such person is not committed or detained by virtue of any process, judgment, decree or execution specified in Section 8555, How. Stat.

3. The cause or pretense of such confinement or restraint, according to the best of the knowledge and belief of the party;

4. If the confinement be by virtue of any warrant, order or process, a copy thereof must be annexed; or it must be averred that for some sufficient reason a demand of such copy could not be made; or that such demand was made, and that such copy was refused;

5. If the imprisonment be alleged to be illegal the petition must also state in what the alleged illegality consists.

6. It must specify whether the party applies for the writ of *habeas corpus*, or for the writ of *certiorari*; and

7. It must be verified by the oath of the party making the application.¹

Penalty for refusing to consider petition, etc.—Any judge who shall willfully or corruptly refuse or neglect to consider such application or petition shall be deemed guilty of malfeasance in office.²

See Puterbaugh's Common Law Pl. & Pr. Chapter XIV; 1 Green's New Pr. 676 *et seq.*, where the subject of this section is more fully considered. For forms of petitions for *habeas corpus* see Puterbaugh's Com. Law Pl. & Pr., Chapter XIV; 2 Green's New Practice 1495, 1496.

SECTION V.

WRITS OF ERROR.

Nature of.—A writ of error is a writ of right, and may be prosecuted in all cases, unless prohibited by some statute or inflexible rule of law. It is defined to be a writ issued out of a court of competent jurisdiction, directed to the judges of a court of record in which final judgment has been given, and

¹ How. Stat. § 8558.

² Public Acts 1889, No. 59, page 63; How. Stat. Supp. § 8556.

commanding them, in some cases, themselves to examine the record, in others to send it to another court of appellate jurisdiction, therein named, to be examined, in order that some alleged error in the proceeding may be corrected.¹

Writs of error in civil and criminal cases, upon any final judgment or determination, may issue, of course, in vacation as well as in term, and shall be returnable to the same court.²

The writ of error lies only to review final judgments and determinations of courts of law and of record in proceedings had according to the course of common law;³ or proceedings substantially analogous thereto.⁴

When summary proceedings for the recovery of the possession of lands are appealed to the Circuit Court, the trial there being according to the course of the common law, may be reviewed on error.⁵ And so, error lies from an order of the Circuit Court dismissing a writ of *certiorari* issued by that court to review the proceedings of a circuit court commissioner under the same statute;⁶ and from the judgment on the trial of an appeal from the allowance or disallowance of a will;⁷ and from the judgment of the Circuit Court upon an appeal from the Probate Court, when the controversy is in substance according to the course of the common law;⁸ and so, from a judgment on appeal from proceedings in the Probate Court to compel an administrator to pay a creditor's claim;⁹ and from an order of the Circuit Court dismissing an appeal from a justice's court;¹⁰ and from the dismissal of a writ of replevin;¹¹ and from the judgment or order of the Circuit Court for the removal of a nuisance;¹² and from the judgment and determination of the Circuit Court in dismissing a writ of *habeas corpus*;¹³ and the findings and judgment upon a referee's report.¹⁴

¹ 2 Bouv. L. D. 852; Stephen on Pl. 138.

² How. Stat. § 8678.

³ *Holbrook v. Cook*, 5 Mich. 225; *Hicks' case*, 20 Mich. 129.

⁴ *Fletcher v. Clark*, 39 Mich. 374.

⁵ *Parker v. Copeland*, 4 Mich. 528.

⁶ *Robens v. Videto*, 33 Mich. 341.

⁷ *A. B. M. Union v. Peck*, 9 Mich. 445.

⁸ *Labar v. Nichols*, 22 Mich. 200.

⁹ *Brown v. Forsche*, 43 Mich. 492.

¹⁰ *Willis v. Gimbert*, 27 Mich. 91;

see *Stall v. Diamond*, 37 Mich. 429.

¹¹ *Jewell v. Lamoreaux*, 30 Mich. 155.

¹² *Crippen v. People*, 8 Mich. 117.

¹³ *In the Matter of Hicks*, 20 Mich. 129.

¹⁴ *Near v. Mitchell*, 23 Mich. 382.

And so error lies to review a joint judgment against a principal and his sureties on an appeal bond.¹

A writ of error will lie from an order overruling a demurrer to a plea in abatement since such order is in effect a final determination.²

Proceedings to test the validity of orders of the Probate Court appointing guardians for incompetent persons may be reviewed upon *certiorari* or writ of error.³

The writ of error will not lie to review an order of the Circuit Court dissolving a writ of attachment;⁴ or to review proceedings not according to the course of the common law.⁵ Hence, proceedings under the bastardy act,⁶ and in attachment,⁷ will not be reviewed on error; nor proceedings on *habeas corpus* had before a circuit judge at chambers;⁸ nor are questions relating to the taxation of costs reviewable upon error.⁹

The province of a writ of error is to bring up for review final judgments or determinations, and it is not employed to bring up interlocutory decisions or discretionary orders made pending litigation. This has been declared in numerous decisions of the court.¹⁰ Unless such discretion should be abused.¹¹

Error does not lie on a judgment upon an award rendered by arbitrators under a statutory submission, where the submission is in due form, and the award is one that could have been lawfully made.¹² Nor does it lie in behalf of the public to review a judgment of acquittal in a criminal case; but proceedings that have not gone to trial may be reviewed;¹³ nor to

¹ *Evers v. Sager*, 28 Mich. 47.

² *Campbell v. Hudson*, 106 Mich. 523.

³ *Coat v. Willette*, 93 Mich. 304.

⁴ *Gore v. Ray*, 69 Mich. 114; *Gray v. York*, 44 Mich. 415.

⁵ *Ib.*; *Parker v. Copeland*, 4 Mich. 528; *Churchill v. Burt*, 32 Mich. 490.

⁶ *Cross v. People*, 8 Mich. 113.

⁷ *Gore v. Ray*, 69 Mich. 114; *Gray v. York*, 44 Mich. 415.

⁸ *Faust v. Judge of Calhoun Circuit*, 30 Mich. 266.

⁹ *Lorman v. Phoenix Ins. Co.*, 33 Mich. 65; *Stebbins v. Field*, 43 Mich. 833.

¹⁰ *Brady v. Railroad Co.*, 73 Mich. 457; *Chaffee v. Soldan*, 5 Mich. 242; *Conrad v. Freeland*, 18 Mich. 255; *Adams v. Church*, 22 Mich. 79; *Holbrook v. Cook*, 5 Mich. 225; *Polhemus v. Bank*, 27 Mich. 44; *Comstock v. Circuit Judge*, 30 Mich. 98; *Miller v. Rosier*, 31 Mich. 475.

¹¹ *Broune v. Moore*, 32 Mich. 256; see *Willis v. Gimbert*, 27 Mich. 91; *Altman v. Young*, 38 Mich. 410; *Brinsmade's Appeal*, 52 Mich. 537; *Knox v. Milliard*, 52 Mich. 543.

¹² *Cooper v. Andrews*, 44 Mich. 94.

¹³ *People v. Swift*, 59 Mich. 529.

review the discharge on *habeas corpus* of a prisoner held for a criminal offense.¹ No writ of error upon a judgment of conviction for treason, or for murder in the first degree, shall issue, unless allowed by one of the justices of the Supreme Court, after notice given to the attorney-general.²

Where, upon conviction in a criminal case, a review is sought before judgment, on exceptions taken, no writ of error is required;³ nor are exceptions needed.⁴ But it seems that a conviction for the violation of a city ordinance can not be reviewed on exceptions before judgment.⁵

By whom brought.—The party aggrieved by the action of the court below is the proper person to bring the writ, if the judgment is to his disadvantage.⁶

In case of the death of the party aggrieved, it may be brought by his executors or administrators, if the judgment was to recover any debt or damages only, or any personal property;⁷ or, in case of the death of such party, if the judgment was for the recovery of real estate or the possession thereof; or, if the title to real estate was determined thereby, by the heirs or devisees of such deceased party, to whom such real estate was devised or descended, or might have descended.⁸

If judgment be obtained against several persons, and one or more of them die, a writ of error may be brought thereon by the survivor or survivors.⁹

Any party in whose favor any judgment may have been rendered, if dissatisfied therewith, may prosecute a writ of error; provided he has not waived his right thereto.¹⁰

Against whom brought.—A writ of error brings up the

¹ *People v. Conant*, 59 Mich. 565; *People v. Fairman*, 59 Mich. 568.

² How. Stat. § 8683.

³ *Patten v. People*, 18 Mich. 314; *People v. Jones*, 24 Mich. 230-1; *People v. Knapp*, 26 Mich. 168.

⁴ *Wattles v. People*, 13 Mich. 446; *Patten v. People*, *supra*.

⁵ *People v. Jackson*, 8 Mich. 110.

⁶ *Teller v. Willis*, 12 Mich. 268; *Harrison v. Clark*, 1 Scam. (Ill.) 31; *Schlinaker v. Risley*, 3 Scam. (Ill.) 483; *Taff v. Hosmer*, 14 Mich. 249; *Cole v. Thayer*, 25 Mich. 212;

Spencer v. Fish, 43 Mich. 226; *Tidd's Pr.* 1080.

⁷ Comyn's Pl. 3 B. 9; 2 Green's N. P. 864.

⁸ Comyn's Pl. 3 B. 9.

⁹ 1 Stran. 234; 2 Green's New. Pr. 864; see *Campau v. Brown*, 48 Mich. 145; *Cole v. Thayer*, 25 Mich. 212; *Mills v. Bunce*, 26 Mich. 101; *Sick v. Mich. Aid Assoc.*, 49 Mich. 50.

¹⁰ *Tidd's Pr.* 1079; *Addix v. Fahnestock*, 15 Ill. 448; *Hartman v. B. & O. F. R. R. Co.*, 64 Ill. 24.

whole case; and where a judgment has been in favor of two of the defendants to a joint demand and against the other, it was held that a writ of error brought against the two only will be dismissed and that the defendants would not be severed in that manner.¹

The writ should be brought against the same parties who were parties to the judgment complained of; or, in case of death, if the judgment was for the recovery of any debt, or damages only, or any personal property, against his executors or administrators.² And if it was for the recovery of real estate or the possession thereof, or in an action by which the title to real estate was determined, then the writ must be brought against the heirs of such person to whom such real estate descended, or against the devisees of such estate.³

Joinder of parties.—Supreme Court Rule 10 provides that in cases where the writ of error shall be brought by one or more of several parties such party shall, at least fifteen days before filing his *præcipe* for writ of error, serve upon the other parties against whom the judgment has been entered, a notice of his intention to apply for a writ of error; and the parties upon whom such notice is served shall, within ten days thereafter, serve notice on such party of their intention to join in such writ of error, or in default thereof on filing of *præcipe* for the writ of error and proof of service of such notice, a rule may be filed granting such parties leave to prosecute such writ of error severally.

Limitations—When to be brought.—All writs of error upon any judgment or final determination, rendered in any cause, in any court of law and of record in this State, shall be brought within one year after the rendering of such judgment, or final determination made, and not after, except in cases where the person against whom any such judgment shall be rendered, or final determination made, shall be, at the time, either (1) within the age of twenty-one years; or (2) insane; or (3) imprisoned on any criminal charge, or in execution upon some conviction of a criminal offense, for any term less than for life; or (4) a married woman.⁴

¹ *Mills v. Bunce*, 26 Mich. 101.

² 2 Green's New Pr. 806.

³ *Ib.*; Bro. Error, 9; Roll's Abr. 749.

⁴ Public Acts 1889, No. 151, page 170; How. Stat. § 8697; How. St.

Supp. § 8686.

The time during which such disability shall continue, shall not be deemed any portion of the time above limited for bringing a writ of error; but such person may bring such writ after the time so limited, and within two years after such disability shall be removed. And if the person entitled to bring such writ shall die during the continuance of any disability specified above, his heirs, devisees, executors or administrators entitled to bring such writ, may bring the same after the time so limited for that purpose, and within two years after such death.¹

But the existence of any disability specified above, shall not authorize the bringing of a writ of error upon any judgment after the expiration of five years from the time of rendering the same. And if an action of debt or writ of *scire facias* be brought on any judgment, a writ of error to reverse the judgment may be sued out at any time within two years after the bringing of such action of debt or writ of *scire facias*.²

The time within which the writ may issue, commences to run from the rendition of the judgment;³ and the time given by statute will not be extended by a motion to vacate the judgment.⁴

Extension of time for suing out the writ.—The time in which writs of error may be taken out, may be extended not exceeding six months by the Supreme Court, or by one of the Supreme Court justices at chambers, where the party has been prevented from taking out the same by circumstances not under his control. Such extension shall only be made on special motion and after a proper showing.⁵

The dismissal of a writ of error is equivalent to a non-suit, and is no bar to the issuing of a writ at any time within the period allowed by statute for issuing such writs.⁶

For form of writ of errors from the Supreme Court to the Circuit Court, see 2 Green's New Practice, 1350.

¹ How. Stat. §§ 8687, 8688; see Public Acts, 1889, page 170.

² How. Stat. §§ 8689, 8690; see Public Acts, 1889, page 170.

³ *Teller v. Willis*, 12 Mich. 384; *Lorden v. Ins. Co.*, 14 Mich. 232.

⁴ *Buckley v. Sutton*, 38 Mich. 1.

⁵ Public Acts, 1889, No. 151, page 170; How. Stat. Supp. § 8686.

⁶ *Beller v. Stevens*, 40 Mich. 168.

SECTION VI.

APPEALS FROM CIRCUIT COURTS IN CHANCERY.

Who may appeal.—Any complainant or defendant, who may think himself aggrieved by the order overruling a general demurrer, or by the decree or final order of a circuit court in chancery in any cause, may appeal therefrom to the Supreme Court.¹ The right to appeal from one court to another is not a constitutional one.² It is derived entirely from the statute,³ and can not be conferred by consent.⁴ The right of appeal is absolute, and the case must be so disposed of in the court below as to permit a complete disposition of it on appeal.⁵ It does not depend upon the merits of the case.⁶

Where an administrator declines to appeal from the allowance of a claim against the estate, an heir who appeals in his name is entitled to the management and control of the appeal.⁷

Jurisdiction of appeals.—Where a common law form of reviewing statutory proceedings does not exist, or is not resorted to, the conditions and form of appeal depend entirely upon the statute, and can not be changed or aided by judicial action.⁸

Where an appeal is not taken within the statutory time, and there is no provision for enlarging the time, there is no jurisdiction to hear it.⁹

The action of a court in affirming an order appealed from amounts to an assertion of jurisdiction, and is improper where the court considers the proceedings extra judicial.¹⁰

¹How. Stat. § 6737; *Labor v. Nichols*, 23 Mich. 310; *Carney v. Carney*, 63 Mich. 382.

²*Kundinger v. Saginaw*, 59 Mich. 355.

³*Weed v. Lyon*, Walk. Ch. 77; *Cady v. Mfg. Co.*, 48 Mich. 133; *Demaray v. Little*, 17 Mich. 387.

⁴*Ib.*; *Maxfield v. Freeman*, 39 Mich. 64; *Chapin v. Perrin*, 46 Mich. 130.

⁵*Hewlett v. Shaw*, 9 Mich. 346.

⁶*Michigan Ins. Co. v. Whittemore*, 12 Mich. 311.

⁷*King v. Gridley*, 69 Mich. 84.

⁸*People's Ice Co. v. The Excelsior*, 43 Mich. 336.

⁹*Portage Lake, etc., v. Haas*, 20 Mich. 326; see *Canfield v. City*, 21 Mich. 130.

¹⁰*Lloyd v. Wayne Circuit Judge*, 50 Mich. 236.

When appeal lies.—An appeal in chancery lies only from a final decree or order.¹

A final decree which grants the relief prayed for, and gives the complainant the immediate benefit of judicial action by an injunction that in effect puts an end to the defendant's business, is appealable, even though a further decree may be necessary upon the completion of the accounting.²

In order to be final it is not necessary that the decree should dispose of all the merits of the case. Whenever it finally adjudicates any part of them it is appealable.³ Nor does the question as to whether a decree is final or not, depend upon the stage of the case in which it is made; the test is its effect upon the rights of the parties.⁴

Final orders and decrees from which appeal lies.—

Decrees for costs;⁵ orders denying writ of assistance;⁶ striking a bill from the files;⁷ adjudging a party guilty of contempt and imposing punishment;⁸ refusing to set aside decree for irregularity;⁹ dismissing a cross-bill;¹⁰ denying leave to file bill of review;¹¹ setting aside foreclosure sale after confirmation;¹² confirming sale on foreclosure decree;¹³ appointing receiver to take charge of assets of estate; on bill aiding proceedings to remove the administrator;¹⁴ to take possession of realty and personalty on special proceedings, and to eject the occupant;¹⁵ giving receiver power to dispossess one who is *prima facie* the lawful occupant of premises;¹⁶ to take possession and dis-

¹ *Caswell v. Comstock*, 6 Mich. 391;
Demaray v. Little, 17 Mich. 386;
Maxfield v. Freeman, 39 Mich. 64.

² *Smith v. Walker*, 57 Mich. 457,
458; *Perrin v. Lepper*, 56 Mich. 351;
Witbeck v. Chittenden, 50 Mich. 428.

³ *Lewis v. Campau*, 14 Mich. 460;
Taylor v. Sweet, 40 Mich. 739.

⁴ *Taylor v. Sweet*, *supra*; *McCombs v. Merryhew*, 40 Mich. 721; *Barry v. Briggs*, 22 Mich. 204.

⁵ *McCabe v. Farnsworth*, 27 Mich. 52.

⁶ *Baker v. Pierson*, 5 Mich. 456.

⁷ *Webster v. Hitchcock*, 11 Mich. 56.

⁸ *Romeyn v. Caplis*, 17 Mich. 449;
People v. Simonson, 9 Mich. 492;

Haines v. Haines, 35 Mich. 138;
Brener v. Kidd, 23 Mich. 440.

⁹ *Mich. Ins. Co. v. Whittemore*, 12 Mich. 311.

¹⁰ *Bank v. Bronson*, 14 Mich. 361;
Clutton v. Clutton, 106 Mich. 690.

¹¹ *Johnson v. Shepard*, 35 Mich. 115; *Scriven v. Hursh*, 39 Mich. 98;
Beecher v. R. Co., 40 Mich. 308.

¹² *Bullard v. Green*, 9 Mich. 222;
Laurence v. Jarvis, 36 Mich. 281.

¹³ *Ins. Co. v. Renz*, 33 Mich. 298.

¹⁴ *Lewis v. Campau*, 14 Mich. 458.

¹⁵ *McCombs v. Merryhew*, 40 Mich. 721; *Port Huron v. St. Clair Circuit Judge*, 31 Mich. 456.

¹⁶ *Arnold v. Bright*, 41 Mich. 207.

pose of all firm property held by surviving partner;¹ decree of divorce though reference is ordered as to alimony;² an order vacating a sale and ordering a new sale on new terms;³ a decree upon a petition filed for revision of decree of divorce;⁴ fixing the rights of parties, though ordering accounting of rents and profits, and to ascertain if partition is practicable;⁵ order enjoining a replevin suit for property to which plaintiff claims title;⁶ declaring complainant entitled to dower though further inquiry is directed as to partition;⁷ decree for divorce against the wife involving her dower rights, the husband having since died;⁸ setting aside conveyance as fraudulent, and including reference to ascertain *mesne profits* to be paid by defendant;⁹ adjudging receiver guilty of contempt, who was illegally appointed, for disobeying an order requiring him to restore property that had come to him as such receiver.¹⁰ *Mandamus* will not lie to obtain a decision upon the merits in a chancery case, appeal being the proper remedy.¹¹

The effect of an appeal is to stay all proceedings until otherwise ordered by the court.¹²

An appeal lies from an order in a divorce suit overruling a plea of no marriage, when the defendant elects to stand by his plea.¹³ And an order committing a defendant for contempt in refusing to pay temporary alimony is appealable.¹⁴

Where a general demurrer is interposed to a bill, and is sustained in the Circuit Court, an appeal lies to the Supreme Court;¹⁵ but an appeal will not lie from an order overruling a demurrer that is general and special.¹⁶

Interlocutory orders not final.—An appeal does not lie from an order sustaining a demurrer, but not finally disposing

¹ *Barry v. Briggs*, 22 Mich. 201.

² *Shaw v. Shaw*, 9 Mich. 164.

³ *Perkins v. Perkins*, 16 Mich. 162.

⁴ *Chandler v. Chandler*, 24 Mich. 176.

⁵ *Damouth v. Klock*, 28 Mich. 163; *Shepherd v. Rice*, 38 Mich. 556.

⁶ *M. & M. Bank v. Kent Circuit Judge*, 43 Mich. 292.

⁷ *Brown v. Bronson*, 35 Mich. 415.

⁸ *Shafer v. Shafer*, 30 Mich. 163.

⁹ *Hack v. Norris*, 47 Mich. 587.

¹⁰ *People v. Jones*, 33 Mich. 303.

¹¹ *Sherwood v. Davis, etc.*, 106 Mich. 540.

¹² How. Stat. § 6738; see *Gale v. Gould*, 40 Mich. 62.

¹³ *Cross v. Cross*, 54 Mich. 115.

¹⁴ *Ross v. Ross*, 47 Mich. 186.

¹⁵ *Carney v. Carney*, 63 Mich. 382.

¹⁶ *Turck v. Soule*, 55 Mich. 128; see How. Stat. § 6737.

of the case;¹ or granting temporary alimony;² or for opening for review a decree for permanent alimony, and ordering a reference;³ or dissolving a temporary injunction;⁴ or denying motion to dissolve;⁵ or refusing temporary injunction;⁶ or allowing bill of review to be filed;⁷ or setting aside *pro confesso* decree, and permitting defense;⁸ or appointing receiver ancillary to equitable relief;⁹ or opening bidding before confirmation, and directing new sale on condition;¹⁰ or a decree directing reference to do that which the court, but for power to refer, would have to do itself;¹¹ or a decree consisting in part of reference for accounting;¹² or an order to discharge a receiver, and requiring an accounting;¹³ or refusing appointment of receiver in a foreclosure suit;¹⁴ or appointing receiver to take possession of securities held under disputed right;¹⁵ or denying motion to stay foreclosure sale, and vacating temporary order staying sale;¹⁶ or a decision announced, but no decree drawn up and filed;¹⁷ or an order declaring there should be specific performance, but not giving directions, and requiring further inquiry;¹⁸ or confirming report of special commissioner, on reference, to ascertain amount due between parties;¹⁹ or of confirmation of commissioner's report on reference to examine and state partnership account;²⁰ or order setting aside allowance of payment, and referring the cause for computation of the amount due on the basis of such allowance.²¹

And an appeal in chancery does not lie which involves

¹ *Blackwood v. Van Vleet*, 10 Mich. 398; *People v. Calhoun Circuit Judge*, 28 Mich. 269.

² *Ross v. Ross*, 47 Mich. 186; *Cooper v. Mayhew*, 40 Mich. 528; *Lapham v. Lapham*, *Ib.* 527; *Haines v. Haines*, 35 Mich. 138.

³ *Perkins v. Perkins*, 10 Mich. 425.

⁴ *Boinay v. Coates*, 17 Mich. 411; *Spencer v. Stearns*, 28 Mich. 463.

⁵ *Wing v. Warner*, 2 Doug. 288.

⁶ *Duncan v. Duncan*, 15 Mich. 415.

⁷ *Maxfield v. Freeman*, 39 Mich. 64; *Beecher v. R. Co.*, 40 Mich. 307.

⁸ *Prentiss v. Rice*, 2 Doug. 296.

⁹ *Bank v. Kent Circuit Judge*, 43 Mich. 292.

¹⁰ *Demaray v. Little*, 17 Mich. 386.

¹¹ *Casnell v. Comstock*, 6 Mich. 391.

¹² *Enos v. Sutherland*, 9 Mich. 148.

¹³ *Colgate v. R. R. Co.*, 28 Mich. 288.

¹⁴ *Beecher v. M. Co.*, 40 Mich. 307.

¹⁵ *Brown v. Vander Meulen*, 41 Mich. 418.

¹⁶ *Romeyn v. Hale*, 1 Mich. 93.

¹⁷ *Newbould v. Stewart*, 15 Mich. 155.

¹⁸ *Patterson v. Hopkins*, 23 Mich. 541.

¹⁹ *Bewick v. Alpena, etc.*, 39 Mich. 700.

²⁰ *Kingsbury v. Kingsbury*, 20 Mich. 212.

²¹ *Morris v. Morris*, 5 Mich. 171.

nothing but costs on demurrer upon the dismissal of a bill without prejudice.¹ Nor from an order refusing to punish a defendant for contempt.²

Appeal from tax decree.—In case a decree is given in favor of the validity of any disputed tax, and the person contesting its validity desires to appeal to the Supreme Court, he shall be allowed to do so on paying the amount of the decree to the county treasurer, within ten days after the date of such decree, who shall retain the same until the decision of the Supreme Court, and pay the same to the party interested if such tax is held invalid; if held valid, then such money shall be credited to the proper fund, etc.³

Claiming an appeal.—An appeal shall be claimed by a written claim, delivered or transmitted within forty days from entry of such decree or final order, to the register of the court where such decree or order was entered.⁴ Until the decree is drawn up and filed, there is no legal decision of the cause.⁵ If the decree is made and entered in vacation, the forty days commence to run from notice of its entry.⁶

When the testimony is taken in open court, either party has forty days from the settlement of the case in which to appeal; provided forty or more days have elapsed since the entry of the decree.⁷

But in such case it is not necessarily a ground for the dismissal of the appeal that it was taken before the case was settled.⁸

Unless the appeal is taken within the time prescribed by the statute, the right of appeal will be lost.⁹

Appellant's bond—How approved.—The appellant must, within said forty days, file with the register a bond to the appellee, with sufficient sureties, approved by a circuit judge

¹ *Jenness v. Smith*, 58 Mich. 280.

² *Rasch v. Shepard*, 105 Mich. 667.

³ Public Acts 1889, page 252;
How. St. Supp. § 1170 *f. q.*; *Carney v. Baldwin*, 95 Mich. 442.

⁴ How. Stat. § 6738; see *Gale v. Gould*, 40 Mich. 62.

⁵ *Sellers v. Botsford*, 9 Mich. 490;
Newbould v. Stewart, 15 Mich. 155.

⁶ How. Stat. §§ 6491, 6492; *Mc-*

Clung v. McClung, 39 Mich. 55;
Kinney v. Washtenaw Circuit Judge,
12 Mich. 26.

⁷ *Love v. Francis*, 63 Mich. 181;
Gale v. Gould, 40 Mich. 62; *Vos v. Dykema*, 26 Mich. 401; *Riggs v. Sterling*, 51 Mich. 159.

⁸ *Simons v. Simons*, 47 Mich. 645;
Public Acts 1887, page 358.

⁹ *Weed v. Lyon*, Walk. Ch. 77.

or circuit court commissioner of said county, and with such penalty as such judge or commissioner shall approve, conditioned for the performance or satisfaction of the decree or final order of the Supreme Court in the cause and payment of all cost of the appellee in the matter of appeal.¹

Unless the bond is filed within the forty days, no jurisdiction will be conferred² and the right of appeal will be lost.³

If the bond is filed in due time, it makes no difference whether it precedes or follows the claim of appeal.⁴

Insufficient bond.—Where an appeal bond is defective or insufficient, the remedy is by motion in the Supreme Court for leave to amend or to file a new bond; and not by *mandamus* against the judge who approved it.⁵

Notice of appeal.—The appellant is required, within twenty days after perfecting his appeal, to give written notice of such appeal, and of the day when filed, on all the other parties, whether joint or adverse, who have appeared in such cause; and a copy of such notice, with proof of service thereof, shall be filed in the office of the clerk of the Supreme Court, within ten days after such service.⁶

The failure to give notice may be excused,⁷ as the requirement for giving notice is directory, and not jurisdictional.⁸

A notice of appeal is waived by appellee noticing for hearing.⁹

No. 265. *Claim of appeal.*

STATE OF MICHIGAN.

The Circuit Court for the County of ———. In Chancery.

A B,	}	Complainant,
		<i>vs.</i>
C D,		Defendant.

And now comes the said (*complainant or defendant*), and hereby claims

¹ How. Stat. § 6738.

² *Moore v. Ellis*, 18 Mich. 77; *Weed v. Lyon*, Walk. Ch. 77.

³ *Covell v. Mosely*, 15 Mich. 514.

⁴ *Emerson v. Atwater*, 5 Mich. 34.

⁵ *Pulte v. Wayne Circuit Judge*, 47 Mich. 646; see *Perrin v. Kellogg*, 37 Mich. 316.

⁶ Supreme Court Rule 14, *ante*, page 690.

⁷ *Garrett v. Litchfield*, 10 Mich. 451; *Tucker v. Stone*, 92 Mich. 298.

⁸ *Simpson v. Mansfield*, 38 Mich. 626, 629; see *Shook v. Proctor*, 26 Mich. 283.

⁹ *Durfee v. McClurg*, 5 Mich. 532; *Cameron v. Adams*, 31 Mich. 71.

the benefit of an appeal to the Supreme Court from the (*decree or final order*) rendered in said cause by said court upon the — day of, A. D. 18—.

Dated, etc.

G H M,

To T F G, -

Solicitor for —.

Register of said Court.

Where both parties appeal, each must file his claim of appeal.

No. 266. Bond on appeal.

Know all men by these presents that we, A B, as principal, and C D and E F, as sureties, are held and firmly bound unto G H in the sum of — dollars, lawful money of the United States of America, to be paid to the said G H, or to his certain attorneys, heirs, executors, administrators and assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, and each and every of them, firmly by these presents.

Sealed with our seals and dated this — day of —, A. D. 18—.

Whereas, the above named A B has appealed to the Supreme Court of the State of Michigan, from (*a decree, or final order, as the case may be*) of the Circuit Court for the county of —, in chancery, made on the — day of —, A. D. 18—, in a cause in said court in which A B was complainant and G H was defendant. Now, therefore, the condition of this obligation is such, that if the said A B shall diligently prosecute his said appeal, and shall perform and satisfy the decree or final order of the Supreme Court in said cause, and shall pay all the costs of said G H in the matter of said appeal, as the Supreme Court shall award, then this obligation to be void, otherwise to remain in force.

A B, [L. s.]

C D, [L. s.]

E F. [L. s.]

No. 267. Notice of application for approval of bond on appeal.

STATE OF MICHIGAN.

The Circuit Court for the County of —. In Chancery.

(*Title of cause.*)

To H K, Esq.,

Solicitor for complainant.

You will please to take notice that the defendant in the above cause has claimed the benefit of an appeal to the Supreme Court from the (*decree or final order, as the case may be*) made therein on the — day of —, A. D. 18—, by the Circuit Court of the county of —, in chancery, and that a bond for costs and damages (*or bond for costs and to stay proceedings*), with C D and E F as sureties, a true copy of which is hereto annexed, has been duly executed, and that an application will be made on the — day of —, A. D. 18—, to J M D, a circuit court commissioner (*or circuit judge*) at his office in the (*city or village*) of —, in the county of —, at — o'clock in the — noon of said day for an approval of said bond and sureties.

Dated, etc.

J W B,

Sol. for defendant and appellant.

No. 263. Notice of appeal.

STATE OF MICHIGAN.

Supreme Court in Chancery.

(Title of Cause.)

To C S M, Esq.,

Solicitor for the defendant and appellee.

You will please to take notice that upon the — day of — A. D. 18—, a claim of appeal was filed with the register of the Circuit Court for the county of — in chancery, by which the complainant and appellant claimed the benefit of an appeal to the Supreme Court from the (*decree or final order as the case may be*), rendered in said cause by the Circuit Court for the county of — in chancery on the — day of — A. D. 18—, and that upon the — day of — A. D. 18—, a bond as required by the statute, duly approved by S W O, a circuit court commissioner in and for the county of — was filed with the register of said Circuit Court for the county of — in chancery, in his office in the (*city or village*) in said county of —.

Dated, etc.

H F S,

Solicitor for complainant and appellant.

No. 269. Affidavit of service of notice of appeal to be filed in Supreme Court clerk's office.

STATE OF MICHIGAN.

Supreme Court in Chancery.

(Title of Cause.)

— County, ss.

J W P, being duly sworn, deposes and says that he resides in the township of — county of — in said State, that he is — years of age, and is personally acquainted with C S M, the solicitor for the above named defendant and appellee, and that upon the — day of —, A. D. 18—, at — o'clock in the — noon, deponent served on said C S M, by handing to him personally, a notice of appeal, of which the annexed is a true copy. Deponent further says that said C S M was the solicitor of record of said defendant in the court below, and further deponent says not.

J W P.

Subscribed and sworn to before me this — day of —, A. D. 18—.

J S.

Notary Public, — County, Michigan.

Settling case heard in open court.—We have heretofore considered this subject, and the proper practice to be pursued in relation thereto.¹

When, within the time allowed for settling a case, the circuit judge before whom the cause was tried, resigns without settling the same, the Supreme Court on appeal, on an appli-

¹ *Ante*, page 153.

cation of the appellant, will reverse the decree, and remand the case for a new trial, but without costs.¹ But when the testimony is taken in open court, and the judge before whom the same was tried goes out of office before the time for settling the case, it may, under § 7613 How. Stat., be settled from the stenographer's minutes, in suits where there is an official stenographer.²

When proofs have been taken in open court, and decree rendered, the circuit judge has power, after the sixty days from the date of the decree, to grant an extension of the time for making and filing a case, provided the time so allowed does not exceed the statutory period of three months.

The application need not necessarily be made within sixty days.³ Where it is in the power of the party to have his case settled, and he does not do so, he loses the benefit of his testimony taken in open court. But when the delay is caused by officers of the court, such as through sickness or inability of the stenographer or circuit judge, over which he has no control, and without fault or negligence on his part, a settlement of the case made after the three months will be good.⁴ In such case the Supreme Court will extend the time to perfect the appeal, and if the return has been made, it will give opportunity to correct such defects as were not due to the appellant's negligence. If the transcript has not been signed, the proper certificate can be obtained from the circuit judge that the case was settled, and that the proofs are correct, and filed with the record.⁵

Where a case is certified to the Supreme Court under Circuit Court Rule 48, a statement of the errors relied on should be filed as provided for in that rule. And where a case made is agreed upon by the parties, and the circuit judge directs a judgment to be entered thereon in favor of the plaintiff, the failure of the defendant to except to such order, or assign error thereon, is fatal to his right to a review of the judgment in the Supreme Court, and the case will be dismissed.⁶

¹ *Scribner v. Gay*, 5 Mich. 511; *Hewlet v. Shaw*, 9 Mich. 346; *Tucker v. Tucker*, 26 Mich. 443.

² *Johnson v. Johnson*, 49 Mich. 639.

³ *Tilden v. Wayne Circuit Judge*, 44 Mich. 515.

⁴ *Cameron v. Calkins*, 43 Mich. 191.

⁵ *Gram v. Wasey*, 45 Mich. 223.

⁶ *McKinnon v. Atkins*, 60 Mich. 418.

Where the testimony in a chancery suit is taken in open court, and no case has been settled under the statute, it must stand for hearing on appeal upon the pleadings, orders, files and decree *alone*, and it will be presumed that there was evidence in the lower court to sustain the decree made.¹

Register's return.—Upon the appellant paying to the register the sum of five dollars, the register must attach together all the original pleadings, processes, motions, notices, orders and decrees which have been filed, together with the original minutes of all the testimony, whether taken in open court, by a commissioner, or settled by the court, and also a copy of all journal and calendar entries, and all other proceedings of record not embraced in the original papers, and transmit the same with his certificate, etc., to the Supreme Court, within fifteen days after such appeal shall be perfected. If the appellant neglects to pay the register such fee for thirty days after such appeal shall have been perfected, he will be deemed to have waived his appeal, and the appellee may at once proceed to enforce his decree, as though no appeal had been taken.² This provision of law requiring the payment of five dollars to the register, within a certain time, is merely for the protection of the register, and the appeal is not considered waived if the register proceeds without it to act, and makes the return. The fee may be waived by the register. It is only when he refuses to act that the appellant loses his appeal.³

So, too, the statutory provision that the register is to make his return within fifteen days, a provision which modifies Supreme Court Rule 15, is merely directory in its nature. If the return is made before a motion in the Supreme Court to dismiss the appeal is called up, the motion will be denied unless there has been gross negligence. Still, if no adequate excuse is made for the delay, the appellee will be awarded costs.⁴ The appellant should show that he has done all in his power to procure a return.⁵ If the appeal is not perfected within the

¹ *Sheldon v. Weatherwax*, 75 Mich. 418.

² Comp. L. 1871, § 5182; How. Stat. § 6740.

³ *Taylor v. Boardman*, 16 Mich. 506.

⁴ *Lathrop v. Hicks*, 2 Doug. 222;

Maynard v. Hoskins, 8 Mich. 81; *Garret v. Litchfield*, 10 Mich. 451; *Babcock v. Trust*, 16 Mich. 282; *Covell v. Moseley*, 15 Mich. 514; *Beebe v. Young*, 13 Mich. 221.

⁵ *Taylor v. Boardman*, 16 Mich. 506; *Moore v. Ellis*, 18 Mich. 77;

statutory period it goes to the jurisdiction, and *laches* on the part of the appellee will not prevent him moving to dismiss on that ground.¹ But notice of hearing by an appellee is a waiver of irregularities in taking the appeal.²

Extending time for return.—The time for returning the record in an appeal case may be extended by one of the justices of the Supreme Court or a circuit judge for good cause shown, and the order granting such extension shall be returned, with the other papers, to the clerk of this court. Such extension shall be had only upon proper notice to the adverse party.³

The time in which writs of error may be taken out may be extended not exceeding six months by the Supreme Court or by one of the supreme court justices at chambers, when any party has been prevented from taking out the same by circumstances not under his control. Such extension shall only be made on special motion and after a proper showing.⁴

What the return includes.—We have already seen that the register must attach together, and return all the original pleadings, processes, motions, notices, orders and decrees which have been filed, together with the original minutes of the testimony, whether taken in open court or by a commissioner, or settled by the court, and also a copy of all journal and calendar entries and all other proceedings of record not embraced in the original record, together with any affidavit and order extending the time for making the return.⁵ His return should also include the appeal bond.⁶ Where demurrers to the original and amended bill have been sustained, the original bill is part of the record on appeal, and should be included in the return.⁷ But, on appeal from a decree on accounting, unless questions of fraud or forgery, or some special difficulty should require it, transcripts from partnership books, and not the books themselves, should be returned.⁸

Ball v. Ball, 18 Mich. 380; *Fields v. Colby*, 102 Mich. 449.

¹ *Moore v. Ellis*, 18 Mich. 77.

² *Durfee v. McClurg*, 5 Mich. 532.

³ Supreme Court Rule 16, *ante*, page 690; How. Stat. § 6739.

⁴ How. St. Suppl. § 8686.

⁵ Page 722, *ante*.

⁶ *Riopele v. Doellner*, 26 Mich. 102.

⁷ *Harrison v. Dewey*, 46 Mich. 173.

⁸ *Maynard v. Hoskins*, 8 Mich. 81;

Wright v. Dudley, 8 Mich. 115;

Brown v. Thomson, 29 Mich. 72.

*No. 270. Affidavit for order granting extension of time for return.**(Venue and title of cause as in No. 204, ante, page 510.)*

A B, the complainant in the above entitled cause, being duly sworn, on oath states, that the decree (or final order) in said cause, was entered in said cause on, etc.; that the complainant filed his claim of appeal to the Supreme Court on, etc.; that on, etc., he filed the bond required by the statute, with sufficient penalty, and with sureties duly approved as the law requires.

Deponent further says that (*here state the reason why the return can not be made in the time required by law, and the ground for extension.*) That he makes this affidavit for the purpose of obtaining an order extending the time for the register of said court to make his return to the Supreme Court in said cause, and respectfully prays that the same may be made accordingly.

A B.

Subscribed and sworn to, etc.

*No. 271. Order extending time for return.**(Venue and title of cause as in No. 204, ante, page 510.)*

On reading the affidavit of A B, complainant in the above entitled cause, hereto annexed, it is ordered, for reasons appearing in said affidavit, that the time for the register of said court to make his return to the Supreme Court, to the appeal in said cause be, and the same is extended for the period of — days from this date.

Dated, etc.

_____, Circuit Judge.

*No. 272. Notice of extension of time for making return.**(Venue and title of cause as in No. 204, ante, page 510.)*

To P Q, Esq., solicitor for defendant :

You will please take notice that the time for making return by the register of said court, in said entitled cause, has been extended by the honorable —, judge of the Circuit Court, for the period of — days from and after the date of the order; as will appear by the order of said judge, with a true copy of which you are herewith served.

Dated, etc.

_____, Solicitor for complainant.

SECTION VII.

MOTIONS.

Special motion days.—Rule 29 provides that Tuesday of the first week in term, and every Tuesday thereafter during term, shall be special motion days, on which motions shall have preference over calendar causes; and all special motions shall be noticed for one of those days where notices are neces-

sary. All motions shall be heard on the day for which they are noticed, unless adjourned over to a subsequent day, or unless there is not time to hear the same on the day for which they are noticed, in which case they shall be heard on the next or succeeding day.¹

Notices of motion.—All notices must be in writing, and served on the attorney or solicitor in the cause.² They may be served by leaving the same with the attorney or his agent, or with his clerk in his office, or with the person having charge thereof, etc.³ When a party other than an attorney, prosecutes or defends in person, the service may be on such party personally, or through the postoffice. And no service shall be necessary to be made on a defendant who has not appeared in the cause, and given notice to the plaintiff's attorney of his intention to defend the suit.⁴

Notices of motions must be served at least four days before the time noticed, unless the attorney for the adverse party resides outside the city of Lansing, in which case the time is increased one day for each one hundred miles or fraction thereof distant between his place of residence and the city of Lansing.⁵ In computing distance the usual route of travel must govern.⁶

Motion docket.—The clerk will enter all motions on a motion docket, to be by him provided for the purpose, and in the order in which they are delivered to him, and will, on the opening of the court on motion day, present the docket to the court. Motions will be called for argument in their order, and no motions will be entertained unless brought forward as provided in the rule.⁷

Motion to dismiss appeal.—A motion to dismiss an appeal must be made at the earliest opportunity; and it should state the ground upon which it is based;⁸ but a delay in moving to

¹ Supreme Court Rule 29, page 693, *ante*; see *People v. Supervisors*, 19 Mich. 9; *Mason v. Kellogg*, 38 Mich. 132.

² Supreme Court Rules 21, page 691, *ante*.

³ Rule 22.

⁴ Supreme Court Rule 24.

⁵ Supreme Court Rule 28.

⁶ *Raymond v. Hinckson*, 15 Mich. 577.

⁷ Supreme Court Rule 31, *ante*, page 693.

⁸ *Warner v. Whittaker*, 5 Mich. 241; *Stewart v. Dixon*, 6 Mich. 391; *Powers v. Irish*, 23 Mich. 430; *Jacquith v. Hale*, 30 Mich. 163; *O'Flynn v. Eagle, etc.*, 7 Mich. 306.

dismiss will not prejudice the appellee if the appeal was not taken in time, so that the court has not acquired jurisdiction.¹ It may be made for want of prosecution, and when upon the latter ground the court may grant the motion or deny the same on such terms and conditions as the justice of the case may require.²

An appeal in chancery can be dismissed for want of jurisdiction only.³

An appeal will not be dismissed on the ground that the order appealed from was a matter of discretion in the court below,⁴ nor for a failure of the register to make a full return,⁵ nor on the ground of an imperfection in the record.⁶

The merits of a case can not be considered on a motion to dismiss an appeal therein.⁷

Motion to dismiss writ of error.—The right to sue out a writ of error should be contested upon a motion to dismiss the writ, supported by proper showing.⁸

If the appellant fails to have the writ of error or *certiorari* returned on or before the return day thereof, or to assign errors, and serve copies of such assignment within the time allowed for that purpose, or in cases of appeals in chancery shall fail to file the record and proceedings in the court below within forty days after the filing and approval of the appeal bond, the appellee may move the court to have the writ of error or *certiorari* dismissed for want of prosecution;⁹ but the court will grant or deny the motion on such terms and conditions as the justice of the case may require.¹⁰

Motions based upon the irregular action of the opposite party should be made at the earliest opportunity, and will not be entertained after the lapse of a term unless some very satisfactory reason is shown for the delay.¹¹

¹ *Moore v. Ellis*, 18 Mich. 77.

² Supreme Court Rule 9, *ante*, page 689.

³ *First Nat'l Bank v. Barnum Wire Works*, 58 Mich. 315.

⁴ *Mich. Ins. Co. v. Whitmore*, 12 Mich. 311.

⁵ *Maynard v. Hoskins*, 8 Mich. 81.

⁶ *Verplank v. Hall*, 21 Mich. 469; *University v. Rose*, 45 Mich. 284.

⁷ *First Nat'l Bank v. Barnum Wire Works*, *supra*; *Mich. Ins. Co. v. Whitmore*, *supra*.

⁸ *Hager v. Coup*, 50 Mich. 54.

⁹ Supreme Court Rule 8, *ante*, page 688.

¹⁰ Supreme Court Rule 9, *ante*, page 689.

¹¹ *O'Flynn v. Eagle*, 7 Mich. 306; *Smith v. Mitchell*, 9 Mich. 261.

A writ of error is of right, and its dismissal is equivalent to a non-suit, and does not bar the issuing of a new writ.¹

Discontinuing of a writ of error does not vacate the judgment, and, in the absence of some agreement vacating it, it remains a lawful adjudication, the payment or settlement of which does not impair its judicial force.²

The motion must distinctly state the grounds upon which it is based, and if it fails to do so, it will not be entertained by the court.³

No. 273. Motion to dismiss writ of error.

(*Venue and title of cause as in No. 204 ante, page 510.*)

And now comes the defendant in error (or *appellee*,) and moves the court to dismiss the writ of error issued in said entitled cause, and for grounds of such motion, shows to the court here the following, that is to say: (*Here set forth the grounds of the motion.*) This motion is based upon the files and records in said cause, and also upon the affidavits of G H, O P and Q S; this day filed in said cause.

E F,

Attorney for defendant in error.

SECTION VIII.

AMENDMENTS OF RECORD.

The Supreme Court has no authority to amend the records sent from inferior tribunals. But it may, in a proper case, compel their correction by *mandamus*.⁴ And, although the court may, on proper showing, compel the correction of a bill of exceptions so as to conform to the facts, it will not do so until it is shown that mistakes exist which are injurious to the party applying for the correction; and where the judge who signed the bill of exceptions has gone out of office, the bill can not be remanded for correction.⁵

In case, however, of the death, resignation, or expiration of the term of office of the judge before whom the case was

¹ *Beller v. Stevens*, 40 Mich. 168; see *Taff v. Hosmer*, 14 Mich. 249; see *Hitchcock v. Pratt*, 51 Mich. 263.

² *Cummerford v. Paulus*, 66 Mich. 648.

³ *Jaquith v. Hale*, 30 Mich. 163.

⁴ *De Moss v. Van Buren Circuit*

Judge, 41 Mich. 725; *Sweetzer v. Mead*, 5 Mich. 33; *Scribner v. Gay*, Ib. 211; *Evans v. Norris*, 6 Mich. 691.

⁵ *Van Valkenburg v. Rogers*, 17 Mich. 322; *Scribner v. Gay*, 5 Mich. 511.

tried, where there is an official stenographer of such court who has taken full minutes of the testimony, exceptions and charges of the judge at such trial, such minutes shall be *prima facie* evidence of the testimony given, exceptions taken and the charge of the court, and other proceedings on such trial, and such exceptions may be settled and signed by the successor in office of such judge, or by any judge authorized in such cases to perform the general duties of the judge of such court.¹

But the death of a trial judge, without acting upon a bill of exceptions, duly submitted to him, entitles the party applying for it to a new trial, in a case where the right to a new trial was asserted and vested before Sec. 7613, How. Stat., was passed.²

An application for an order to bring up an amended record must be made with diligence and in apt time; there should be no *laches* on the part of the party applying.³

SECTION IX.

ASSIGNMENT OF ERRORS.

In practice, the assignment of errors is the statement of the case of the plaintiff in error, on a writ of error, setting forth the errors complained of. It corresponds with the declaration in an ordinary action.⁴

All the errors of which the plaintiff complains should be set forth and assigned in distinct and specific terms, so that the defendant in error may plead to them.⁵

The proceedings upon writs of error, as to the assignment of errors, and as to the appearance of the defendant in error, and the pleadings, judgment, and all other matters not herein provided for, shall be according to the course of the common

¹ How. Stat. § 7613; *Mason v. Phelps*, 48 Mich. 126.

² *Campau v. Superior Court Judge*, 40 Mich. 630; *Stebbins v. Field*, 41 Mich. 373; see *Wright v. Superior Court Judge*, *Ib.* 726.

³ 2 Green's New Pr. 879; *Farrand v. Bentley*, 6 Mich. 281; *Verplank v.*

Hall, 21 Mich. 469; *O'Flynn v. Eagle*, 8 Mich. 136.

⁴ 2 Tidd's Pr. 1168; 3 Steph. Com. 644; 1 Bouv. L. D. 197.

⁵ *Webster v. Fisk*, 9 Mich. 250; *Altman v. Wheeler*, 18 Mich. 240; *Green v. Brookins*, 23 Mich. 48.

law, as modified by the practice and usage in this State, and such general rules as shall be made by the Supreme Court.¹

Assignments of error must be based upon exceptions taken;² otherwise they will not be considered.³

Errors must be specifically assigned, or they will be deemed as waived;⁴ and an assignment of errors is supposed to be abandoned if it is not argued, or otherwise insisted upon in the Supreme Court.⁵ And a claim made for the first time in the Supreme Court, and not falling within any errors assigned on the record, will not be noticed.⁶

Assignments of error ought not to be needlessly multiplied;⁷ but the rulings upon which they are founded should be specifically pointed out;⁸ and it is not sufficiently specific if the error relied on is not singled out by the assignment, or by the exception on which it rests.⁹

The weight of evidence will not be considered on review;¹⁰ nor any errors that do not prejudice;¹¹ nor will the court consider any errors except such as operate adversely to the inter-

¹How. Stat. § 8682.

²*Hill v. Robinson*, 23 Mich. 24; *Green v. Bennett*, Ib. 464; *McMillan v. Cheese Factory*, Ib. 544; *Hogelskamp v. Weeks*, 37 Mich. 422; *Hall v. People*, 39 Mich. 717; *Larkin v. Lumber Co.*, 42 Mich. 296.

³*Supe v. Francis*, 49 Mich. 266; *Beal v. Polhemus*, 67 Mich. 130; *Melch. Co. v. Walker*, 41 Mich. 239; *Welfg v. Bagg*, 12 Mich. 41; *Johnson v. Ballou*, 25 Mich. 400; *Tupper v. Kilduff*, 26 Mich. 394; *Polhemus v. Bank*, 27 Mich. 44; *Peabody v. McAvoy*, 23 Mich. 536; *Jennison v. Haire*, 29 Mich. 207; *R. R. Co. v. Forbes*, 30 Mich. 165; *People v. Barker*, 60 Mich. 277; *Cooper v. City*, 67 Mich. 607; *People v. Shelters*, 99 Mich. 333.

⁴*Lang v. People*, 14 Mich. 439; *Monroe v. R. R. Co.*, 28 Mich. 272; *Alberts v. Village*, 96 Mich. 549; *Warner v. Mears*, 102 Mich. 554; *Mahiat v. Codde*, 106 Mich. 387.

⁵*Roberts v. Wilkinson*, 34 Mich.

129; *Mnfg. Co. v. Runnels*, 55 Mich. 130.

⁶*Lane v. Boom Co.*, 62 Mich. 64; *Slater v. Chapman*, 67 Mich. 523; *Creager v. School Dist.*, 62 Mich. 102; *Lymburner v. Jenkinson*, 50 Mich. 488; *Wierengo v. Ins. Co.*, 98 Mich. 621; *Gamb's v. Estate*, 101 Mich. 355; *Mower v. Verplanke*, 105 Mich. 398.

⁷*Fowler v. Gilbert*, 38 Mich. 292; *Burt v. Long*, 106 Mich. 210.

⁸*Ib.*; see *Waterman v. Waterman*, 34 Mich. 490; *Burt v. Olcott*, 33 Mich. 178; *Mnfg. Co. v. Hurley*, 99 Mich. 16.

⁹*Baylis v. Stout*, 49 Mich. 215; see *Green v. Brookins*, 23 Mich. 48; *People v. Sweeney*, 55 Mich. 586.

¹⁰*R. R. Co. v. Judson*, 34 Mich. 507; *Young v. Taylor*, 36 Mich. 25; *Miller v. Petrie*, 40 Mich. 657; *Johnson v. Crispell*, 43 Mich. 261.

¹¹*Comstock v. Smith*, 20 Mich. 338; *Hill v. Robinson*, 23 Mich. 24; *Burden v. People*, 26 Mich. 162; *Richards*

ests of the party suing out the writ; nor if the particular defendant who made it did not appeal.⁴

Where the correctness of the ruling of the court in directing a verdict depends entirely upon the correctness of prior rulings admitting certain evidence, error should be assigned upon such earlier rulings as well as upon such direction.⁵

On an appeal in chancery, the rights of such defendants as have allowed the bill to be taken as confessed, can not be considered, except so far as necessary to determine the rights of those who appeared and defended.⁶

On an appeal from a decree on an accounting, the appellant's objections only will be considered.⁷

Assignment of error on charge of court.—The statute provides that it shall not be necessary in any suit, action or proceeding, civil or criminal, in any circuit court, to except to the charge given to the jury, but any party aggrieved by any such charge, may assign errors upon such charge, in his assignment of errors, the same as if exception had been made to such charge.⁸

This is a remedial statute, and was intended to apply to cases pending at the time of its passage as well as to those subsequently commenced.⁹

Assignments of error, based on the refusal of the court to give requests to charge will not be considered when the requests are not made a part of the bill of exceptions.⁹

An exception to a charge may be supported in the Supreme Court by the assignment of any reason which the record will justify, whether they were stated in the court below or not.⁹

v. Tozer, 27 Mich. 451; *Beebe v. Knapp*, 28 Mich. 53; *Ins. Co. v. Horton*, 28 Mich. 173; *Booming Co. v. Jarvis*, 30 Mich. 308; *Harvey v. McAdams*, 32 Mich. 473; *Eberstein v. Camp*, 37 Mich. 176; *Kelso v. Saxton*, 40 Mich. 666; *Clark v. Field*, 42 Mich. 342.

¹ *Berry v. Lowe*, 10 Mich. 9.

² *Lumber Co. v. McDonald*, 57 Mich. 292.

³ *McCammon v. R. R. Co.*, 103 Mich. 104.

⁴ *Morgan v. R. R. Co.*, 57 Mich.

431, 447; *McComb v. Prentiss*, *Ib.* 225.

⁵ *Ryan v. Brown*, 18 Mich. 212; *Bundy v. Youmans*, 44 *Id.* 376; *Sweeney v. Neely*, 53 *Id.* 421; *Cutcheon v. Corbett*, 99 *Id.* 584.

⁶ Public Acts 1885, No. 101, page 104; How. St. Supt. § 7621 b.

⁷ *Hufford v. R. R. Co.*, 64 Mich. 632; *Just v. Porter*, *Ib.* 565.

⁸ *Hopkins v. Bishop*, 91 Mich. 328.

⁹ *Vanneter v. Crossman*, 39 Mich. 610.

No. 274. *Assignment of errors.*

STATE OF MICHIGAN.

In the Supreme Court.

C D,	}
Plaintiff in error,	
vs.	
A B,	}
Defendant in error.	

And now comes the said C D, the plaintiff in error (*or appellant*), by E F, his attorney, and says, that in the record and proceedings, and in rendering judgment as aforesaid, there is manifest error, in this, to wit:

I. The court erred in, etc. (*Set forth the error relied on, specifically.*)

II. The court below erred, etc. (*And so on.*)

III. The court below erred in giving the several instructions to the jury, asked by the plaintiff, and in refusing to give the several instructions, or any or either of them, as asked by the defendant.¹

By reason whereof, the plaintiff in error (*or appellant*), prays that the said judgment may be reversed, etc.

By E F, his attorney.

Amendment of assignments of error may be made upon a proper showing, on motion.²

Plea of release of errors. — A plea of release of errors should aver that it was by deed, by parol, or by acts *in pais*; and should set forth the facts that are relied on as a release of errors.

A party to a record can not release an error which is personal to another party; but a release by one of several defendants in error is good, where the error only relates to himself.³

A release of errors, although presented in writing, signed by the parties in whose names the writ of error was sued out, can not be properly brought to the notice of the court except by being pleaded.⁴

If a party voluntarily receives the benefit of a judgment or decree, he can not afterward claim that the same was erroneous; and a plea of release of errors would thereby be sustained;⁵

¹ See *Niles v. Rhodes*, 7 Mich. 374; *People v. Sweeney*, 55 Mich. 374.

² *Parsons v. Copland*, 5 Mich. 144; *Trudo v. Anderson*, 10 Mich. 357; *Johnson v. Ins. Co.*, 12 Mich. 216.

³ *Henrickson v. Van Winkle*, 21 Ill. 274; *Hall v. Jones*, 32 Ill. 39.

⁴ *Kern v. Zink*, 55 Ill. 449; *Trustees, etc., v. Hihler*, 85 Ill. 409.

⁵ *Ruckman v. Alwood*, 44 Ill. 183; *Morgan v. Ladd*, 2 Gilm. 414; *Thomas v. Negus*, Ib. 700; *Corwin v. Shoup*, 76 Ill. 246.

nor can a party avail himself of a part of a decree in his favor and secure its fruits, and then procure a reversal in an appellate court of such portions as militate against him. If a decree is reversed the parties should be placed in *statu quo*.¹

No. 275. Plea of release of errors.

(*Venue and title of cause as in No. 204, ante, page 510.*)

And the defendant in error (*or appellee*), by R S, his attorney, comes and says, that the plaintiff in error (*or appellant*) ought not to maintain his said writ of error (*or appeal*) in this behalf against him, the defendant in error (*or appellant*), because he says, that after the rendition of said judgment (*or decree*), and before the suing out of the writ of error (*or prosecution of said appeal*) on, to wit, the — day of —, 18—, the plaintiff in error (*or appellant*) by his deed of that date, and now to the court here shown, released to the defendant in error (*or appellee*) any and all errors in the record and proceedings aforesaid, as by the said deed, reference thereto being had, will more fully appear; and this the defendant in error (*or appellee*) is ready to verify. Wherefore he prays judgment if the plaintiff in error (*or appellant*) ought to maintain his said writ of error (*or appeal*) against him, etc.

By R S, his attorney.

Replication to special pleas may be filed traversing the allegations.

Limitation to writs of error.—We have already seen the time within which a writ of error must be brought.²

No. 276. Plea of statute of limitations to a writ of error.

(*Venue and title of cause as in No. 204, ante, page 510.*)

And the defendant in error, by E F, his attorney, comes and says that the said plaintiff in error ought not to maintain his said writ of error in this behalf against him, the defendant in error, because he says that the said judgment complained of was rendered on, etc., more than — years prior to the bringing of the said writ of error in this cause, as aforesaid; and this the defendant in error is ready to verify; wherefore he prays judgment, etc.

By E F, his attorney.

To the plea of the statute of limitations the plaintiff in error may reply any matter that would take the case out of the operation of the statute. He can reply that he was an infant, or insane, or imprisoned on a criminal charge, etc., or extension of time by a justice of the Supreme Court, etc.

Trial of issue of fact.—If an issue of fact be joined, it may

¹ *Holt v. Reese*, 46 Ill. 181.

² *Ante*, page 711.

be tried in the Supreme Court, and a *venire* may be issued for a jury to try the same (*Teller v. Wetherell*, 6 Mich. 46); or such issue may be sent to the proper Circuit Court for trial, which is the most convenient and usual course. In the latter case the Supreme Court makes an order, and gives such directions as the nature and circumstances of the case may require; and a copy of the pleadings is transmitted, and returned with a report of the trial as in other cases.¹

SECTION X.

PRINTED RECORD.

The party removing a cause into the Supreme Court by writ of error, appeal, *certiorari*, case made, or otherwise, and in cases reserved, the plaintiff below shall prepare a printed record for the use of the court and counsel, which shall contain all of the testimony, and so much of the pleadings, record and proceedings (and no more) as are necessary to present the question raised.²

In all cases the appellant shall cause the record to be printed as soon as practicable after the filing of the return in such court; and as soon as the printing is completed, shall serve on the appellee at least two copies of the printed record, and before the first day of the term at which the cause shall be noticed for argument, the appellant shall file with the clerk at least twelve copies thereof. The appellant shall, in any case, cause the record to be served upon the appellee within thirty days after the filing of the return and within the time allowed by rule for the service of the first brief; but this shall not be construed to give the appellant thirty days in every case, but only so much time as is reasonably necessary.

In case of the failure of appellant to print and serve the record, as above required, the court may, on motion, dismiss the case and award costs, or further time may be granted on such terms as shall be proper. In case of failure to file the record as above provided, the cause will be stricken from the calendar and further dealt as justice may require.³

¹ 2 Green's New Pr. 885; *Austin v. Bainter*, 40 Ill. 82; *People v. Young*, Ib. 87; *People v. Supervisors*, Ib. 87.

² Supreme Court Rule 35.

³ Supreme Court Rule 38; *Leland v. Top*, 97 Mich. 612.

The record of the trial court should not contain prolix and irrelevant matter, which is only productive of expense, wrong, and oppression to parties, in taking cases to Appellate Court for review.¹

Where the evidence is not made a part of a bill of exceptions, but is merely printed with it, the Supreme Court will not examine it to ascertain the facts.²

The necessary expense of printing the case and points required by the rules, may be taxed as disbursements in favor of the party prevailing in the cause.³

Where the record fails to show that the bill of exceptions contains all the evidence, the court are bound to presume that there was sufficient evidence to justify the instructions given by the trial court.⁴

And it will not be assumed that no foundation was laid for hypothetical questions.⁵

SECTION XI.

PRINTED BRIEFS.

What to contain.—The party bringing a case into the Supreme Court shall, in his brief, make a clear and concise statement of the case, and the errors upon which he relies. The court will consider such statement sufficient and accurate unless the opposite party shall point out in his brief wherein the statement is insufficient or inaccurate.⁶

The brief must fairly present the cause on each side.⁷

Errors not noticed in the brief, or argued, or otherwise insisted upon in the Supreme Court, will be regarded as abandoned;⁸ and a claim made for the first time in the brief by the plaintiff in error, or appellant, or in his argument, and not be-

¹ *People v. Milliard*, 53 Mich. 77; *Finch v. Karste*, 97 Mich. 21; *Turner v. Foundry*, Id. 166.

² *People v. Cline*, 44 Mich. 290; see also *Millerd v. Reeves*, 1 Mich. 107; *People v. Pearsall*, 50 Mich. 233; *Noble v. Bourke*, 44 Mich. 193.

³ See Supreme Court Rule 48, *ante*, page 697.

⁴ *Bond v. McMahon*, 94 Mich. 557; *Weston v. Estate*, 101 Mich. 526.

⁵ *Crowell v. Truax*, 94 Mich. 585.

⁶ Supreme Court Rule 40.

⁷ Supreme Court Rule 41.

⁸ *Estey Mfg. Co. v. Runnels*, 55 Mich. 130; *Hudson v. Newton*, 36 Mich. 35; *Roberts v. Wilkinson*, 34 Mich. 129; *Moore v. Patrick*, 100 Mich. 577.

ing within any of the errors assigned on the record, will not be considered.¹

Only such points as counsel make and rely on for reversal in their original brief, will be considered by the court; even though additional errors may be assigned.³

The assignments of error of one of two appellants, who presents no brief, will not be considered.⁴

When to be served.—When complainant is appellant.—When the complainant is also appellee two copies of his brief must be served upon the appellee as soon as printed, and at least twenty days before the first day of the term at which the cause is regularly noticed for hearing, and two copies of the appellee's brief must be served upon the appellant as soon as printed, and at least five days before the first day of the term; provided, that if the record and brief of appellant shall be served thirty days before the first day of the term, the appellee's brief must be served at least fifteen days before the first day of the term.

When complainant is appellee.—When the complainant is appellee his brief must be served on the defendant at least fifteen days before the first day of the term (or within ten days after service of the record by appellant, if the same is not served at least twenty-five days before the first day of the term), and the appellant's brief must be served at least five days before the first day of the term (or within ten days after the service of appellant's brief).

Supplemental briefs.—Supplemental briefs may be printed and served at any time before the cause is placed on trial for argument, but subsequently by special permission of the court only.⁵

Failure to serve.—If the brief of either party is not served within the time above required, the opposite party may, at his option, on the first day of the term, have the cause placed at

¹ *Slater v. Chapman*, 67 Mich. 523; *Lane v. Boom Co.*, 62 Mich. 64; see *Creager v. School District*, *Ib.* 102; *Lymburner v. Jenkinson*, 50 Mich. 488.

² *Black v. Dawson*, 82 Mich. 485; *Sullivan v. Hall*, 86 Mich. 7; *Lynch v. Craney*, 95 Mich. 200; *Graves v.*

Battle Creek, 95 Mich. 266; *Locas v. Ry. Co.*, 92 Mich. 417; *Ashman v. R. Co.*, 90 Mich. 570; *French v. Ryan*, 104 Mich. 625; *Feek v. Township*, 82 Mich. 393.

³ *Locas v. Ry. Co.*, 92 Mich. 412.

⁴ *Busch v. Fisher*, 89 Mich. 193.

⁵ Supreme Court Rule 41.

the foot of the calendar or continued, and the court may, in proper cases, order the payment of a counsel fee by the party in default.¹

Assignments of error mentioned in the brief will not be considered where the exceptions on which they are based are not indexed, nor the pages of the record where they may be found referred to, either in the assignment of error or in the brief.²

SECTION XII.

THE ARGUMENT.

Upon all questions arising under the jurisdiction of the Supreme Court, when argument of counsel may be desired or intended by the parties, or may be requested by the court, the court may order such arguments to be had at any of said terms. And after the argument of any cause, or when the same is submitted on briefs, if the court is of the opinion that a certain point or legal proposition is involved, which is material to the decision of the case, and which has not been raised or argued by counsel on either side, the case will not be decided on such point or proposition until both counsel have had an opportunity to argue the same before the court.³

Time allowed for argument.—In the argument of causes two counsel may be heard on each side. The time allowed for the argument on each side shall not exceed one hour, unless by special permission of the court, on cause shown, granted before argument begins.⁴ Upon hearing of special motions, or orders to show cause, only one argument on a side will be heard; and the time to be occupied in argument is limited to fifteen minutes on a side, unless by special leave of court the time is extended.⁵

Any cause or motion may be submitted to the court by either side, when so desired, upon briefs, without oral argument.⁶

Order of argument.—It is the general rule in practice, that

¹ Supreme Court Rule 41.

² *Reeder v. Moore*, 95 Mich. 595.

³ How. Stat. § 6406.

⁴ Supreme Court Rule 46.

⁵ Supreme Court Rule 27, *ante*, page 692.

⁶ See How. Stat. § 6423.

the party holding the affirmative has the right to open and close the argument. On an application for a *mandamus*, the party called upon to show cause why the writ should not be granted, is entitled to the opening and closing argument; but the relator is entitled to open and close on a demurrer to the answer in such proceedings.¹

SECTION XIII.

CALENDAR OF COURT.

Notice to the clerk.—The priority of causes on the calendar as first made shall depend upon the date of filing notice of hearing with the clerk. The party noticing a cause for hearing shall, at least twenty days before the first day of the term for which the same is noticed for hearing, give notice to the clerk to place such cause on the calendar for the term. No cause shall be entered on the calendar by the clerk until the return record on appeal, or case made shall have been filed in said court, nor without notice to the clerk hereinbefore mentioned. By stipulation, on the forenoon of the first day of the term, cases may be placed lower down on the calendar and grouped to suit the convenience of counsel. After such rearrangement of causes no further changes can be made except to continue or place at the foot of the calendar. In cases where counsel are not present in court, notice of motions for continuance, to be heard on the first day of the term, shall be given at least twenty-four hours previous thereto, and if for any subsequent day, two days' notice shall be given.²

What are calendar cases.—Writs of error and *certiorari*, appeals in chancery, cases made, bills of exceptions in criminal cases, and all other cases which are to be heard upon the merits, are calendar causes; and to be heard at any term, must be placed on the calendar for that term.³

Mandamus causes not heard at the term when the order to

¹ *People v. Treasurer of Wayne Co.*, 8 Mich. 392.

² *People v. Wands*, 23 Mich. 385.

³ Supreme Court Rule 44, *ante*, page 696.

⁴ Supreme Court Rule 43, *ante*, page 696.

show cause is returnable, become calendar causes at subsequent terms.¹

Call of calendar.—The court, on the first day of each term, after motions are disposed of, will commence calling the cases for argument in the order in which they stand on the calendar as re-arranged, and proceed from day to day during the term in the same order; and if the parties, or either of them, shall be ready when the case is called, the same will be heard; and if neither party shall be ready to proceed in the argument, the cause will go over the term unless the court, on cause shown, shall order otherwise. Fifteen cases only shall be considered liable to be called on each day during the term, including the one under argument, if the same shall not have been concluded on the preceding day. No cause shall be taken up out of its order or set down for a particular day, except under special and peculiar circumstances, to be shown to the court. On motion days, motions will take precedence of calendar cases.²

SECTION XIV.

HEARING.

Powers of Supreme Court on appeal.—Upon any order or decree of the Circuit Court in chancery being brought by appeal to the Supreme Court, that court shall examine all errors that may be assigned or found in such order or decree, and shall hear and determine such appeal, and all matters concerning the same, and shall have power to reverse, affirm or alter such order or decree, and to make such other order or decree therein as shall be just.³

Upon an appeal from a final decree, the court may review all previous orders connected with the decree and affecting the merits of the case;⁴ but the merits of the case can not be reviewed after a final decree, upon an order made to enforce it.⁵ And upon such appeal, a decree made prior to the order,

¹ *People v. Township Board of Filmore*, 11 Mich. 197; *People v. Township Board of Salem*, 19 Mich. 11.

² Supreme Court Rule 45, *ante*, page 697.

³ How. Stat. § 6741.

⁴ *Benedict v. Thompson*, 2 Doug. 306.

⁵ *Sheperd v. Rice*, 38 Mich. 556.

and from which the time for an appeal has elapsed, can not be reviewed;¹ nor can proceedings subsequent to the order appealed from, be reviewed.²

Where only one of several parties appeals, no question can be considered on the hearing except such as affect his interest.³

If a party desires the modification of a decree, he must appeal, whether the others appeal or not;⁴ and a decree will not be modified in favor of parties who have not appealed, nor to the prejudice of the party appealing if the others have not appealed.⁵

Records, etc., to be remitted to court below.—When an appeal shall have been so heard and determined, the records and files sent from the Circuit Court in chancery, together with the proceedings and decree or order of the Supreme Court therein, and all things concerning the same, shall be remitted to the Circuit Court in chancery, for the proper county, when such further proceedings shall be thereupon had as may be necessary to carry such decree or order into effect.⁶

Vexatious appeals.—The statute provides that upon the affirming of any decree or upon an appeal being discontinued the court may, in its discretion, award damages for the delay and vexation caused by such appeal.⁷ Damages for vexatious appeals are not given unless the appeal is groundless or oppressive, or there is clear proof of intentional wrong on the part of the party taking it.⁸

Damages are allowed by the statute for vexatious appeals, if oppressive, and are properly imposed where all the trouble and expense are caused by willful and persistent violation of ordinary fiduciary duty, and by obstinate concealment of the facts from judicial inquiry.⁹

¹ *Benedict v. Thompson*, *supra*; *Johnson v. Shepard*, 35 Mich. 117; *Hack v. Norris*, 46 Mich. 587.

² *Kellogg v. Hamilton*, 43 Mich. 269.

³ *English v. Carney*, 25 Mich. 178, 181; *Oliver v. Shoemaker*, 35 Mich. 464.

⁴ *McCabe v. Farnsworth*, 27 Mich. 53; see *Bundy v. Youmans*, 44 Mich. 378.

⁵ *Hanchett v. McQueen*, 32 Mich.

26; *Brown v. Bronson*, 35 Mich. 416; *Proctor v. Robinson*, *Ib.* 284; *Sav. Bank v. Truesdale*, 38 Mich. 430.

⁶ How. Stat. § 6742.

⁷ How. St. § 8982.

⁸ *Hopkins v. Ruggles*, 51 Mich. 474.

⁹ *Heath v. Waters*, 40 Mich. 457; see *McClung v. McClung*, *Ib.* 494; *Campau v. Campau*, 25 Mich. 127; *R. Co. v. Callanan*, 61 Mich. 22.

In a case where the errors assigned consisted in mere irregularities in entering up judgment upon a promissory note taken by confession, the court awarded damages for the delay, in addition to costs.¹

Vexatious suing out of writ of error.—Where a defendant, having brought up by writ of error a judgment for nominal damages for an annoying trespass, the Supreme Court, in affirming the judgment, awarded, in addition to the ordinary costs, \$20 damages for the vexatious litigation.²

Damages for mere delay will be refused where the court is not satisfied of a want of good faith in bringing the writ of error.³

Where there has been a partial reversal, even for a small amount, damages for a frivolous writ of error will be denied. Such damages will not be awarded unless applied for.⁴

No. 277. Order affirming decree in chancery.

(Caption and title of cause.)

This cause having been brought to this court by appeal from the Circuit Court for the county of ———, in chancery, and having been argued by counsel, and due deliberation had thereon, it is ordered, adjudged and decreed by the court, that the said decree (*or order*) of the said Circuit Court for the county of ———, in chancery, be, and the same is hereby in all things affirmed. And it is further ordered, adjudged and decreed that the appellee do recover of and from the appellant his costs to be taxed.

No. 278. Order reversing decree in chancery.

(Caption and title of cause.)

This cause having been brought to this court by appeal from the Circuit Court for the county of ———, in chancery, and having been argued by counsel, and due deliberation had thereon, it is ordered, adjudged and decreed by the court, that the said decree (*or order*) of the said Circuit Court for the county of ———, in chancery, be, and the same is hereby reversed, vacated and held for naught. And it is further ordered, adjudged and decreed, that the appellant do recover of and from the appellee his costs to be taxed.

¹ *Waterman v. Toms*, 7 Mich. 78; *O'Conner v. Parker*, 23 Mich. 24; *Meyerfield v. Stetthimer*, 20 Mich. 418.

² *Fisher v. Dowling*, 66 Mich. 370; see *Foran v. Allen*, 67 Mich. 188; *Schmemann v. Rothfuss*, 46 Mich.

453; *Singer Manuf. Co. v. Benjamin*, 59 Mich. 592.

³ *Storey v. Bird*, 8 Mich. 316; see *Whitaker v. Kilroy*, 70 Mich. 635.

⁴ *Underhill v. Boom Co.*, 45 Mich. 496.

SECTION XV.

REHEARING.

Application for.—No application for a rehearing will be considered by the court unless the moving party, at as early a date as may be practicable, shall cause any papers upon which it is based, together with his reasons for granting the same, to be printed, and twelve copies thereof to be filed with the clerk of the court, nor unless a copy thereof shall be served upon the counsel for the opposite party. Proof of this service shall also be filed with the clerk, and the court, after the expiration of not less than four days from such service, will examine the papers, and without further argument, unless specially ordered, will pass upon the application. The party opposing will be at liberty to file with the clerk his objections to the application, either printed or type-written, as he may prefer, at any time before the application is decided. In motions for rehearing, if denied, the opposing party shall be entitled to tax a motion fee of fifteen dollars, and the expense of printing a brief, if one has been furnished.¹

When granted.—A rehearing will not be granted on the ground of general and particular misapprehension of the record, where all the points raised were presented and considered on the original hearing.²

A rehearing on the same facts and legal controversy is not properly to be granted, unless there has been some very peculiar assumption or defect in the first hearing, by which the court and parties have been misled. The case must be an extraordinary one in which an appellate court can properly revoke its decision on any other ground. It was not contemplated by the adoption of Rule 51, directing how motions for rehearing should be presented, to relax the former practice.³

Where, in the opinion in the case, a fact essential to sustain the conclusion reached by the appellate court is by mistake stated to have been specially found by the jury, but upon the

¹ Supreme Court Rule 51, *ante*, page 698.

² *Nicholas v. Marsh*, 62 Mich. 439.

³ *Brown v. Brown*, 64 Mich. 82;

see *Ryerson v. Eldred*, 18 Mich. 490; *Taylor v. Boardman*, 25 Mich. 527; *Nicholas v. Marsh*, *supra*.

whole record it is clear that such fact was necessarily found in their general verdict, a motion for a rehearing on that ground will be denied.¹

And a rehearing will be denied unless the court's attention is directed either to a misapprehension of the law, or to something in the record or brief that has been overlooked, and is material to a proper disposition of the case.²

Where a question raised by the record, but not argued before, has, nevertheless, been investigated by the court, though not discussed in the opinion delivered, a rehearing will not be granted for the purpose of giving an opportunity of arguing it, where the argument on the motion for rehearing does not present the subject in any different light than that in which it was considered.³

It will not be granted on the ground that a son of the justice who wrote the opinion belonged to a firm who were attorneys of record for one of the parties when the suit was brought, especially if the firm did not manage the case or appear in the appellate court.⁴

A case must be reheard, if at all, on the record, and not on affidavits explaining the facts;⁵ and an argument on the merits can not be made on a motion for rehearing, but only on the rehearing itself, if granted.⁶

SECTION XVI.

COSTS.

Except in a few specified cases, costs are subject to the discretion of the court.⁷ They were not given at common law,

¹ *Johnson v. Davis*, 61 Mich. 278; see also *Cobbs v. Fire Association*, 68 Mich. 465.

² *Auditor v. Hill*, 98 Mich. 326; *Smith v. Walker*, 57 Mich. 457.

³ *Hutchins v. Kimmell*, 31 Mich. 126.

⁴ *McLean v. Scripps*, 52 Mich. 215.

⁵ *Vanneter v. Crossman*, 39 Mich. 610.

⁶ *Kraft v. Rath*, 45 Mich. 20.

⁷ How. Stat. §§ 8978, 8982; *Van Wert v. Chidester*, 31 Mich. 209; *Avery v. Paine*, 12 Mich. 540; *Rogers v. Anderson*, 40 Mich. 290; *Comstock v. Comstock*, 24 Mich. 39; *People v. R. Co.*, 67 Mich. 5; *Murphy v. Stevers*, 47 Mich. 522; *Cross v. Cross*, 55 Mich. 280; *Peterson v. Fowler*, 76 Mich. 259.

and are not recoverable where there is no statutory authority for awarding them.¹

As a general rule, the prevailing party is entitled to costs; but there are exceptions; thus, where persons are unnecessarily brought into court,² and where a decree is partly affirmed and partly modified or vacated, and where such changes are not made in favor of the appellant, and the merits are adjudged against him, the appellee is entitled to costs.³

So, costs are withheld on reversal where appellant's own case is itself without merit;⁴ and where the appellant's defense shows no willingness to do justice;⁵ and where both parties appealed, and the decree was only modified as to the losing party.⁶

So, costs are denied where each party prevails on one branch of an appeal.⁷

Where a decree dismissing a bill is affirmed as to one of the defendants he will recover costs, though it is reversed as to the others.⁸

Costs are not awarded where the case is of a public nature, and has arisen from ambiguous legislation;⁹ nor where the question is novel, and the losing party acted in good faith, on advice of counsel, and under a mistake of his legal rights.¹⁰

As we have seen, the allowance or disallowance of costs is entirely in the discretion of the court, and no precise rule is laid down where they will be allowed or denied. Each particular case with reference to costs, will be determined upon its own merits.

In a suit by the receiver of a mutual fire insurance company, organized under the Act No. 82, Laws of 1873, to recover an assessment, costs follow the judgment, regardless of its amount.¹¹

¹ *Booth v. McQueen*, 1 Doug. 41; *Jeffrey v. Hursh*, 58 Mich. 247, 258; *Tolford v. Church*, 66 Mich. 431, 442.

² *Home v. Lemon*, 37 Mich. 164.

³ *Perkins v. Perkins*, 16 Mich. 162.

⁴ *Williams v. Guard*, 34 Mich. 82.

⁵ *Wohlscheid v. Bergrath*, 46 Mich. 46.

⁶ *Rhead v. Hounson*, 46 Mich. 243.

⁷ *Canfield v. Shear*, 49 Mich. 313; *Sheldon v. Bennett*, 44 Mich. 634.

⁸ *Davis v. Filer*, 40 Mich. 310.

⁹ *Clare County v. Auditor General*, 41 Mich. 182.

¹⁰ *Myer v. Hart*, 40 Mich. 517.

¹¹ *Wardle v. Townsend*, 75 Mich. 385, 396; *Bacon v. Clyne*, 70 Mich. 183; *Russell v. Berry*, 51 Mich. 287; see *Tolford v. Church*, *supra*; How. Stat. § 4263.

Taxation of costs.—Costs must be taxed by one of the justices of the Supreme Court, by the clerk of the court, or by such other officers as the Supreme Court may, by general or special order, designate for that purpose.¹

Notice, of not less than four days, of the taxation must be given; but if the party upon whom such notice is served shall reside outside the city of Lansing the time of service shall be increased one day for every additional one hundred miles distance, or fraction thereof, between his place of residence and the city of Lansing, provided that no notice need be given of more than ten days. The notice must be accompanied by a copy of the bill proposed to be taxed, and a copy of the affidavits in support thereof.²

The necessary expense of printing the record and brief may be taxed as disbursements, in favor of the party prevailing in the cause.³

But the expense of procuring copies of a stenographer's minutes in settling a case can not be taxed.⁴

Neither can the expense of drawing and engraving a map, printed in the record.⁵ A reasonable allowance paid to an accountant, when the services are necessary and of benefit to all concerned, is a valid charge.⁶

The clerk will limit the allowance for printing to the customary rate for such work, unless satisfied that more in good faith has been paid. Counsel have a right to have the printing done where most convenient to look after the proofs.⁷ But the clerk can not determine whether a record is unduly prolix.⁸ When there is no appearance of counsel, counsel fees will not be taxed.⁹ Costs as for a full hearing will be granted on submission of a case on briefs.¹⁰

¹ How. Stat. §§ 8996, 9001, 9002.

² Supreme Court Rule 50, *ante*, p. 698.

³ Supreme Court Rule 48; *French v. Nitch*, 68 Mich. 115; *Maynard v. Vinton*, 59 Mich. 155.

⁴ *Hart v. Lindsay*, Walk. Ch. 72; *Hayes v. Livingston*, 35 Mich. 371; see *Bell v. Pate*, 48 Mich. 640; *Lumber Co. v. Gray*, 73 Mich. 363,

⁵ *Sawyer v. Studley*, Walk. Ch. 153; *Maxwell v. Bridge Co.*, 42 Mich. 67.

⁶ *Godfrey v. White*, 43 Mich. 172. ⁷ *Dickinson v. Seaver*, 44 Mich. 624; *Lumber Co. v. Gray*, 73 Mich. 364.

⁸ *Van Deusen v. Newcomer*, 40 Mich. 525.

⁹ *Brown v. Blanchard*, 40 Mich. 61.

¹⁰ *Engel v. Hall*, 45 Mich. 57.

Where the record contains no index no costs will be allowed for its printing.¹

Costs for printing will be disallowed if the record or brief are unduly prolix.²

Where appellee files no brief neither party will be allowed costs on the affirmance of the decree.³

The clerk receives six dollars for all services in a cause heard and decided on its merits.⁴

The prevailing party taxes a counsel fee on motions which do not finally dispose of the case, ten dollars; on *mandamus* and *certiorari* heard on motion, fifteen dollars; on motions which finally dispose of the case, twenty dollars; and on calendar causes, thirty dollars.⁵

Re-taxation.—Unless a party appears on taxation, or shows good excuse for not appearing, he will not be heard on a motion for re-taxation.⁶ For a re-taxation, the party applies to the court, by motion or petition, specifying the items objected to as erroneously allowed by the clerk, or if irregularity is complained of, the reason should be specified.⁷

An objection that the record is unduly prolix should be made on the hearing and not by a motion for a re-taxation of costs in the form of an appeal from the clerk's taxation.⁸

¹ *Westfall v. Com.*, 93 Mich. 210.

² *Conkey v. Carpenter*, 106 Mich. 2;
Tanner v. Page, Id. 156.

³ *Sawtelle v. Howard*, 106 Mich. 54.

⁴ Supreme Court Rule 2, *ante*,
page 687; How. Stat. § 9006.

⁵ Supreme Court Rule 49, *ante*, p.
698.

⁶ *Taylor v. Boardman*, 16 Mich.
506.

⁷ *Reeves v. Scully*, Walk. Ch. 340.

⁸ *Sanford v. Rowley*, 93 Mich. 509.

CHAPTER LII.

RULES OF PRACTICE IN CHANCERY COURTS OF MICHIGAN.

Section 1. CHANCERY RULES.

2. LAW RULES MADE APPLICABLE TO CHANCERY CAUSES.

SECTION I.

CHANCERY RULES.

RULE 1.

Bills of Complaint.

(a) Suits in chancery shall be commenced by bills of complaint, setting forth the facts relied on, the names of the defendants therein, and the relief desired, and shall be addressed to the court, and signed by the complainant, or his agent or solicitor.

(b) Every bill of complaint shall be divided into paragraphs numbered consecutively, and each paragraph shall contain, as near as may be, a separate and distinct allegation. The prayer of every bill of complaint shall also be divided into paragraphs numbered consecutively, and shall specify the particular relief which the complainant shall conceive himself entitled to, and may also contain a prayer for general relief.

(c) The prayer for process heretofore common in a bill of complaint may be omitted, and the complainant shall be entitled to the process of *subpoena* on the filing of the bill of complaint, and to other process when ordered by competent authority.

(d) A bill of complaint which shall not comply with the rule in respect to paragraphs shall be stricken from the files on motion, unless the court shall deem it proper to allow amendments thereto to cure the defect.

RULE 2.**Verifying Bills of Complaint, etc.**

(a) Sworn bills may be verified by the oath of the complainant, or in case of his absence from the State, or other sufficient cause shown, by the oath of his agent, attorney or solicitor. [Former Rule 7.]

(b) In bills which are to be verified by the oath of the party, the several matters stated shall be stated positively, or upon information or belief only, according to the fact. The oath administered to the party shall be, in substance, that he has read the bill, or has heard it read, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be on his information and belief, and as to those matters he believes it to be true; and the substance of the oath shall be stated in the jurat. [Former Rule 8.]

(c) The bill may be sworn to before any officer authorized by the laws of this State to administer oaths or take affidavits. It may also be sworn to before any notary public or other person authorized by the laws of any other State or Territory to administer oaths; but if sworn to in any other State or Territory, there shall be added the certificate of the clerk of some court of record of the county, under the seal thereof, showing the official character of the person administering the oath, and the genuineness of his signature. The bill may be sworn to in any foreign country before any minister or other diplomatic agent or consul of the United States, or any notary public; but the certificate of such notary shall be made under his notarial seal. [Substitute for former Rule 19.]

RULE 3.**Security for Costs by Non-residents.**

In all cases where the complainant is not a resident of this State, before process shall issue, a bond in the penal sum of one hundred dollars, with one or more sufficient sureties, shall be filed with the register, to be approved by him, conditioned to pay all such costs as shall be decreed against the complainant

in such case; or there shall be indorsed on the bill a general undertaking, by one or more responsible sureties, to pay all costs for which the complainant may become liable, and the register shall indorse his approval of such surety or sureties. [Substitute for former Rule 6.]

RULE 4.

Process—Form of Chancery Subpœna—How Served.

(a) All process, unless otherwise directed, shall be made returnable on a day certain (except Sunday), either in vacation or in term, not less than ten days from the issuing thereof; and if process is not executed on or before the return day, further process may be taken out of course, as often as may be necessary. [Substitute for former Rule 9.]

(b) The names of all the defendants in a cause shall be inserted in the *subpœna*. It may be served by delivering a copy of the writ, subscribed by the complainant, his solicitor, or the officer or person serving the same, and inscribed "copy," and showing the original, under seal of the court, at the time of such delivery, to the defendant. The service may be on or before the return day mentioned in the *subpœna*. [Former Rule 10.]

(c) The *subpœna* in a suit in chancery shall notify the defendant that a bill of complaint has been filed against him by the complainant (naming him), and that if he desires to defend the same he is required to cause his appearance to be filed or entered in the cause in accordance with the rules and practice of the court, in person or by solicitor, within fifteen days after service of the *subpœna* upon him, and the return day thereof shall be indicated at the foot of the *subpœna*, and there shall be an underwriting designating against what defendant, if any, a personal decree is asked. The business address of the complainant's solicitor shall appear upon the *subpœna*.

(d) The form of the *subpœna* may be as follows: [Substitute for former Rule 122.]

STATE OF MICHIGAN,
The Circuit Court for the County of ———. } ss.
In Chancery.

SUBPÆNA.

In the Name of the People of the State of Michigan: To C D, etc.

Greeting:

You are hereby notified that a bill of complaint has been filed against you in the Circuit Court for the County of ———, in chancery, by A B, as complainant, and that if you desire to defend the same you are required to have your appearance filed or entered in the cause, in accordance with the rules and practice of the court, in person or by solicitor, within fifteen days after the service of this *subpæna* upon you. Hereof fail not under the penalty of having said bill taken as confessed against you. The return day of this writ is the ———, day of ———, A. D. 189—.

Witness, the Hon. E F, Circuit Judge, at ———, this ——— day of ———, in the year of our Lord one thousand eight hundred and ———.

..... Register.

..... Deputy Register.

Underwriting: A personal decree is sought against the defendants C D, etc., and the bill is filed to reach interests in property, and not to obtain any further relief against the remainder of the defendants.

..... Solicitor for complainant.

Business address.....

RULE 5.

Proceedings Following the Service of Subpæna.

(a) A defendant desiring to defend a cause, or to have notice of the proceedings therein, shall cause notice of his appearance to be filed or entered in the office of the register of the court within fifteen days after service of the *subpæna* upon him, and within the same time shall serve notice of such appearance upon the complainant's solicitor. Such appearance, whether followed by answer or not, shall entitle him to notice of all future proceedings in the cause.

(b) Such notice of appearance shall be entitled in the cause and addressed to the complainant's solicitor, and may be in substance as follows:

TAKE NOTICE, that the defendant, ——— ———, hereby appears in the above entitled cause and demands a copy of the bill of complaint therein.

Dated, ———.

Yours, etc.,

——— ———,
Solicitor for said defendant.

Business address: ———.

(c) The complainant shall cause a copy of the bill of complaint to be served on the solicitor so appearing, within fifteen days after receiving the notice and demand above mentioned. (But he shall not be required to serve more than one copy of the bill upon any one solicitor, although such solicitor may appear at different times for more than one defendant, and in such case service of a copy of the bill shall be deemed to have been made on the fifteenth day after receiving a subsequent notice of appearance.)

(d) The defendant shall file his demurrer, plea or answer to the bill of complaint within fifteen days after receiving a copy of the bill of complaint.

RULE 6.

Extending Time for Pleading, etc.

The circuit judge (or a circuit court commissioner, in the absence of the judge of the court from the county, or in case of his inability), for a good cause shown, on special motion, after notice to the opposite party, may extend the time for putting in or serving any pleading, or for taking any other step which is required by the rules to be taken within a limited time. [Substitute for former Rule 86.]

RULE 7.

Proceedings on Default of Either Party.

(a) If either party shall make default in filing or serving any pleading or notice, within the time limited by these rules, or the special order of the court in the cause, the opposite party may have the default entered in the common order book, or filed in vacation or in term time.

(b) If the defendant has failed to appear or to plead, answer or demur, the complainant may enter or file an order taking the bill of complaint as confessed, and referring the cause to a commissioner or to the court for proofs.

(c) If the complainant has failed to serve a copy of the bill of complaint, the defendant may, on filing an affidavit of the service of the required notice, and showing the complainant's neglect, enter or file an order dismissing the bill of complaint.

(d) Any order entered under these rules may be set aside on special motion, for cause shown, in the discretion of the court, on such terms as may be deemed just and proper. But to entitle a defendant to an order setting aside his default for want of appearance or answer, he shall proffer a sworn answer showing a defense on the merits as to the whole or a part of the complainant's case. And in cases where personal service shall have been made upon a defendant, and proceedings taken after default on the strength thereof, his default shall not be set aside unless the application shall be made within six months after such service. And in any case where personal service shall have been made upon a defendant, an order setting aside his default shall be conditioned upon his payment to the complainant of the taxable costs incurred in reliance on said default, and the court may impose such other conditions as shall be deemed proper.

RULE 8.

Pleas to a Bill and Practice Thereon.

(a) No plea shall be allowed to be filed to any bill unless upon a certificate of counsel that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant that it is not interposed for delay merely, and that he knows or has good reason to believe it to be true in point of fact.

(b) The defendant may plead to the whole or any part of the bill, but in every case in which the bill specially charges fraud or combination, a plea to such part must be supported by an answer explicitly denying the fraud and combination and the several facts on which the charge is founded.

(c) The complainant may set down the plea to be argued, or he may take issue on the plea, and in default of the complainant taking any action within twenty days the defendant shall be entitled as of course to a decree dismissing the bill, or so much thereof as is covered by the plea, unless the court allow defendant further time for the purpose.

(d) If upon the argument the plea is overruled, the defendant shall be required to answer within such time as the court shall deem reasonable, and if the defendant make default, the

bill, or so much thereof as the plea covered, shall be taken *pro confesso*, and the matter thereof proceeded in and decreed accordingly.

(e) If, upon the argument, the plea is allowed, complainant may, within ten days after notice of such allowance, take issue upon the plea on payment of the costs of hearing thereon, unless he shall, within such ten days, move for leave to amend the bill, on which motion the court may allow such amendment on such terms as it may deem reasonable. Within ten days after the determination of such motion for leave to amend, the claimant may take issue on the plea upon the terms above provided. In default of such motion for leave to amend or in case such leave is denied, and in default of taking issue on the plea, the bill, or so much thereof as is covered by the plea, shall be dismissed. [Substitute for former Rule 25.]

(f) If, upon an issue, the facts stated in a plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him; if the facts are determined for the complainant, the effect shall be the same as though the bill, or so much thereof as is covered by the plea, was taken *pro confesso*.

(g) No plea shall be held bad and overruled upon argument, only because it shall not cover so much of the bill as it might by law have extended to.

(h) No plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to the same matter as may be covered by such plea.

RULE 9.

Demurrers and Practice Thereon.

(a) The form of a demurrer may be as follows:

"The defendant says that the complainant has not stated such a case in his bill as entitles him to relief in a court of equity for the following reasons:" (Adding briefly but plainly the special reasons in matters of substance in a general demurrer, as well as matters of form in a special demurrer.)

(b) If any pleading shall be adjudged bad for any cause which is not plainly specified in the demurrer, the party pleading shall be allowed to amend without costs.

(c) To every demurrer there shall be added the individual certificate of counsel having principal charge of the cause in behalf of the party filing the demurrer, to the effect that the demurrer is not interposed for delay and that in his opinion it is well founded. And a demurrer not accompanied with such a certificate shall be stricken from the files on motion, unless the court shall deem it proper to allow the certificate to be added.

(d) A joinder in demurrer shall not be necessary, and either party may at once notice a demurrer for argument at the next term of court. Such notice shall be served at least ten days before the first day of such term. But if the cause is not in readiness for hearing in time to so notice it, it may be noticed for a subsequent day in term, not less than ten days after such notice, and placed at the foot of the calendar.

(e) If the demurrer be overruled, the court shall, on such terms and conditions as are reasonable, permit the defendant to answer, and if the demurrer be sustained the court shall likewise permit the complainant to amend the bill. [See former Rule 23.]

RULE 10.

Answers and the Practice Thereon.

(a) Whenever in a cause a sworn bill of complaint is filed and a sworn answer demanded, the defendant shall be required to file such sworn answer. But neither a sworn bill nor a sworn answer shall have the force of evidence except as to admissions, and except on the hearing of motions and petitions. Provided, however, that when a cause is heard on bill and answer, the allegations of the answer shall be taken as true. [Substitute for former rule 18.]¹

(b) An answer may be sworn to before the persons and in the manner specified in the rule governing verification of bills of complaint. [See Rule 2.]

(c) An answer shall be divided into paragraphs, numbered consecutively, and each paragraph shall contain as near as may be a separate and distinct allegation, admission or denial.

¹ See *Mfg. Co. v. Adsit*, 74 N. W. Rep. 209; 115 Mich. 652.

An answer not complying with this rule shall be stricken from the files on motion, unless the court shall deem it proper to allow amendments thereto to cure the defect.

(d) Every answer shall contain an explicit admission or denial of each allegation in the bill of complaint as to which the defendant has knowledge or belief. But as to matters charged in the bill as to which the defendant avers he has no knowledge sufficient to form a belief, he shall not be required to admit or deny the same, but shall state his want of such knowledge. And every material allegation in the bill to which the defendant shall not make answer shall be taken as admitted by the defendant.

(e) An answer shall be signed by the defendant, or by his agent or solicitor.

(f) All objections to an answer heretofore raised by exceptions shall be disposed of by the court on special motion. [Substitute for former Rules 18, 23, 27 to 38.]

RULE 11.

Answers in the Nature of Cross-bills and the Practice Thereon.

(a) In any case in equity where a defendant shall claim from the complainant any relief which, according to the established course and practice of courts of chancery, might be had by cross bill, such defendant shall be at liberty by his answer to present the facts upon which his equity rests, and to claim by such answer the benefit of a cross-bill, and the court shall have power to give relief upon such answer to the same extent that it might have given it had a cross-bill been filed. But if the cause be such that, if a cross-bill had been filed, the practice of the court would have required it to be sworn to, the answer claiming such relief shall be under oath, notwithstanding an oath thereto may be waived by the bill. [Former Rule 123.]

(b) In such case the defendant shall first answer the allegations of the bill in accordance with the foregoing rule, before entering upon an allegation of additional matters upon which he shall claim affirmative relief. And his allegations of additional matters and his prayer for affirmative relief

shall comply with the rule governing the form of bills of complaint.

(c) The complainant shall, within fifteen days after service of such answer in the nature of a cross-bill, file and serve a demurrer, plea or answer to the matters therein contained upon which the defendant prays affirmative relief, which pleading, and the practice thereon, shall comply with the rules governing similar pleadings. But the defendant shall not be required to file a replication to any such plea or answer.

RULE 12.

Replications.

(a) The complainant shall file a replication to the defendant's answer within fifteen days after service of such answer. Otherwise the cause shall stand for hearing on such bill and answer, unless the time for filing a replication shall be extended.

(b) The form of a replication may be in substance as follows: "The complainant says that, notwithstanding the answer of the defendant, he is entitled to the relief prayed in his bill of complaint."

(c) A special replication shall not be filed except by leave of the court, for cause shown, on motion. [Substitute for former Rule 45.]

RULE 13.

When Cause is at Issue.

(a) Every cause shall be deemed at issue of fact or law on filing a plea of demurrer, or on filing a replication to the answer, or in a case where an answer in the nature of a cross-bill is filed, when a replication and a demurrer, plea or answer, is filed to such answer in the nature of a cross-bill.

(b) If there be more than one defendant the cause shall be deemed at issue when the replications have been filed to all answers filed, and when an order *pro confesso* has been filed, or entered as to all those defendants who have not answered, or when the cause is discontinued or dismissed as to such defendants.

RULE 14.**Proceedings after Cause is at Issue—The Taking of Testimony, etc.**

(a) In causes where there are more than one defendant, the complainant shall, when the cause is at issue; serve upon the solicitors for such defendant or defendants who have appeared and answered, and whose answers have been replied to, a notice that such cause is at issue; or the solicitor for any defendant may serve like notice upon the complainant and the other defendants who have appeared, and the time for either party to give notice of intention to claim the right to examine witness in open court shall commence from the time such notice is served. In cases where the notice of such intention is given by a defendant he shall serve the same upon the solicitors of all co-defendants who have answered, as well as upon the complainant's solicitor. Proof of service of such notice shall be filed with the register in chancery. [Substitute for former Rule 124.]

(b) If either party shall elect to have the testimony taken in open court, under the statute, and the cause is at issue as to all parties, the cause may thereafter be noticed for trial and hearing in open court by either party. Such notice may be countermanded in the same manner and with like effect as a notice of trial in an action at law.

(c) If neither party so elects, the testimony shall, without further order, be taken before a circuit court commissioner, unless the parties shall stipulate to take it before some other person authorized to administer oaths. The complainant shall put in his testimony in chief within thirty days after the time limited by law for electing to take the proofs in open court; the defendant shall put in his testimony within forty days thereafter; and the complainant shall have ten days thereafter in which to put in his rebutting testimony. At least four days' notice shall be given by each party of the time and place taking such testimony. Each party shall pay in the first instance the fees for taking down and transcribing his own examinations or cross-examinations.

(d) The time for taking testimony may, on motion, for

cause shown, be extended. But the party making application for such extension shall be required to show under oath the specific character of the testimony desired. [See Rule 6.]

(e) Process of *subpoena* to compel the attendance of witnesses before a commissioner shall issue of course, and the time and place of attendance shall be specified in the writ; and such witnesses may be punished by the court as for contempt if they fail to attend and submit to examination. But no witness shall be compelled to appear before a commissioner more than one hundred miles from his place of residence, unless by special order of the court. [Substitute for former Rule 57.]

(f) The testimony shall be taken, as near as practicable, in the manner provided by statute for the taking of depositions, and the commissioner may adjourn the same from day to day as may be deemed proper.

(g) Within five days after the testimony shall be concluded the commissioner, on being applied to for that purpose by either party, shall cause the testimony and exhibits taken or produced before him to be returned and filed with the register of the court. [Substitute for former Rule 58.]

(h) At the expiration of the time for taking testimony, the testimony shall be considered closed without order, and either party may thereupon notice the cause for hearing at the next term of court. Such notice shall be given at least ten days before the first day of the next term. But if the cause is not in readiness for hearing in time to so notice it, it may be noticed for a subsequent day in term, not less than ten days after such notice, and placed at the foot of the calendar.

(i) If the complainant shall fail to take any testimony within the forty days above specified, or within the time allowed him by extension, the defendant may notice the cause for hearing on pleadings.

RULE 15.

Certain Rules Governing in Cases at Law Made Applicable in Chancery Causes.

(a) The following rules governing practice in cases at law shall apply also to practice in chancery causes, so far as the same are not inapplicable, viz.:

- Rule 11, relative to common and special orders and rules.
- Rule 16, relative to filing notes of issue.
- Rule 18, relative to the making of a term calendar.
- Rule 19, relative to motions and petitions.
- Rule 20, relative to stay of proceedings to make motions.
- Rule 22, relative to motions for continuance.
- Rule 23, relative to genuineness of documents.
- Rule 25, relative to the court requiring parties to testify.
- Rules 28, 29, 30, 31, 32 and 34, relative to the manner of the service of papers.
- Rule 35, relative to when service required.
- Rule 36, relative to how time computed on service of papers.
- Rule 37, relative to entitling papers, etc.
- Rule 38, relative to the court files.
- Rule 39, relative to agreements to be in writing.
- Rule 40, relative to affidavit of genuineness of acceptance of service.

Rule 41, relative to depositions.

Rule 43, relative to compelling return of process.

(b) In interpreting said rules in chancery causes, wherever the word "attorney" is used, the word "solicitor" shall be substituted, and wherever the word "plaintiff" is used, the word "complainant" shall be substituted, and in like manner other words commonly used in chancery causes, as distinguished from cases at law, shall be substituted in interpreting said rules.

RULE 16.

Amendment of Bill and Answer Without Leave of Court.

(a) The complainant may amend his bill, if it is not required to be sworn to, at any time before a plea, answer or demurrer is put in, without leave of court, and without costs.

(b) He may also amend his bill, without leave of court and without costs, at any time within fifteen days after answer is filed, if by the amendment a new or further answer is not rendered necessary.

(c) The complainant may also amend, without leave of court, a bill required to be sworn to, in like manner as bills not required to be sworn to, if the amendments are merely in

addition to and not inconsistent with what is contained in the original bill. But such amendments shall be verified by oath.

(d) If the defendant demurs to the bill for want of parties, or for any other defect which does not go to the equity of the whole bill, the complainant may amend of course, without costs, at any time before the demurrer is noticed for argument, or within ten days after receiving a copy of the demurrer.

(e) If a plea or demurrer to the bill be overruled, the complainant may, within ten days thereafter, amend his bill without leave of court and without costs.

(f) After an answer is put in, it may be amended without leave of court in any matter of form, or by filling up a blank, or correcting a date or reference to a document, and may be re-sworn, at any time before a replication is put in, or the cause is set down for a hearing upon bill and answer.

(g) But, after replication, or such setting down for a hearing, it shall not be amended in any material matters, as by adding new facts or defenses, or qualifying or altering the original statements, except by leave of the court, upon cause shown, after due notice to the adverse party. [Substitute for former Rules 21, 22 and 23.]

RULE 17.

Practice on Amendments.

(a) No rule or order need be entered on the filing of amendments which are authorized without leave of court.

(b) In every case of amendment, without leave of court, the party making it shall either file a new engrossment of the pleading, or an engrossed or printed copy of the amendment, containing proper references to the pages and lines in the original pleading on file, where such amendments are to be inserted or made.

(c) No amendments shall be considered as made until the same is served upon the adverse party if he has appeared in the cause.

(d) If, at the time the complainant amends his bill without leave of court, the answer has not been filed, or if a further answer is necessary, the defendant shall have the same time to answer after such amendment as he originally had.

RULE 18.**Proceedings Before Commissioners.**

(a) All parties accounting before a commissioner shall bring in their accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the accounts so brought in shall be at liberty to examine the accounting party upon interrogatories, as the commissioner may direct. On any reference to take or state an account, the commissioner shall be at liberty to allow interest as shall be just and equitable, without any special direction for that purpose, unless a contrary direction is contained in the order of reference. And every charge, discharge or state of facts brought in before a commissioner shall be verified by oath as true, either positively or upon information and belief.

(b) It shall be the duty of every such circuit court commissioner to procure and keep in his office a register, which shall be delivered over to his successor in office, in which he shall enter the title of each cause or proceeding in which he shall make any order, and a complete memorandum of his doings therein. And every commissioner shall file with the register of the court all orders made by him, together with all papers on which the same are based, immediately upon the making of such order. [Former Rules 77 and 114.]

RULE 19.**Reports of Commissioners and Proceedings Thereon.**

(a) In all matters referred to a commissioner, he shall be at liberty, upon the application of any party interested, to make a separate report or reports, from time to time, as he shall deem expedient; the costs of such separate reports to be in the discretion of the court. And where the commissioner shall make a separate report of debts or legacies, he shall be at liberty to make such certificate as he thinks fit, with respect to the state of assets; and any person interested shall thereupon be at liberty to apply to the court as he shall be advised. [Former Rule 78.]

(b) After the report is filed either party may file or enter an order of course to confirm the same, unless cause to the contrary thereof be shown in eight days after notice of its being filed; and if no exceptions are filed and served within that time, the order shall become absolute of course, without further order; or either party may file exceptions, and have an order of course to confirm the report, so far as the same is not excepted to, and with the like effect. [Former Rule 79.]

(c) If either party shall file exceptions to a commissioner's report, such exceptions shall be determined by the court on motion of either party, and the costs thereon shall be in the discretion of the court. [Substitute for former Rule 39.]

RULE 20.

Appeal from Order of Commissioner.

(a) Any person conceiving himself aggrieved by an order made by any circuit court commissioner, in any suit in chancery, may appeal therefrom to the Circuit Court of the county in which such suit is pending: *Provided* (1), that such appeal shall be claimed and entered within fifteen days from the time of making such order; and (2) that the appellant shall, within that time, execute a bond to the appellee in such penal sum, not less than one hundred dollars, as the commissioner shall prescribe, with sufficient surety, to be approved by the commissioner, conditioned to pay, satisfy and perform the order which by the Circuit Court may be made in the premises, and to pay all costs in case the order appealed from shall be affirmed. But no such appeal shall operate as a stay of proceedings, unless a special order to that effect shall be made by the circuit judge or by such circuit court commissioner on proper cause shown.

(b) The appeal bond mentioned in the preceding rule, shall be filed with the circuit court commissioner approving the same, and shall be returned with the appeal papers.

(c) It shall be the duty of the appellant, under these rules, to file with the circuit court commissioner, within the time above limited for claiming and entering his appeal, his reasons for such appeal; whereupon it shall be the duty of such commissioner, within twenty days thereafter, to transmit to the

clerk of the circuit court said bond, and all papers upon which the motion or proceeding may have been founded, or which may have been used on such motion or proceeding, unless already so filed, certified by him; or, in case the original pleadings or files shall have been used, he shall certify such fact to the court with a description of the original papers so used. [Former Rules 115, 116, 117.]

RULE 21.

Restrictions of Powers of Commissioners.

The general powers conferred upon commissioners are hereby restricted in the following particulars:

1. No circuit court commissioner shall be empowered to vacate any order or decree of the Circuit Court, or any order made by a circuit judge. [See Secs. 7147, 7154, How. Stat.]

2. Nor shall he grant any injunction to stay proceedings at law unless reasonable notice of the time and place of hearing the application therefor shall have been previously given to the adverse party. [See Sec. 7141.]

3. Nor shall he grant any injunction without such notice in any case, unless the judge of the Circuit Court in which the application is made shall be absent from the county at the time of such application, or is disqualified from granting an injunction in the cause, nor unless, in the opinion of such commissioner, the peculiar exigencies of the case require it for manifest reasons to be shown by affidavit of the facts and circumstances.

4. Nor shall he grant any injunction restraining the execution or performance of any public improvement, nor to compel a defendant to refrain from doing any act where the injunction will necessarily produce great and irreparable injury to the defendant, if the claim of the complainant is not sustained. Nor shall he grant any injunction in any case where no special provision is made by law for security, except where the injunction prayed for is against a judgment debtor who is made defendant in a creditor's bill, unless the officer granting the same shall take from the complainant or his agent a bond to the party enjoined, in such sum as shall be deemed sufficient, and in not less than \$500, with sufficient surety or sureties, to

be approved of by the officer allowing the injunction, conditioned to pay the party enjoined such damages as he may sustain by reason of the injunction, if the court shall eventually decide that the complainant was not equitably entitled to such injunction, such damages to be ascertained by a reference to a circuit court commissioner, or by the court having jurisdiction of the cause in which the injunction issued, as such court shall direct. Such officer allowing the injunction shall, before the register shall issue the writ, file such bond with such register in chancery, who shall carefully preserve the same for the benefit of the obligee therein named. [Former Rule 112.]

RULE 22.

Costs—Solicitors' Fees Taxable, etc.

The following costs shall be allowed to the prevailing parties, viz.:

In all cases determined by final decree on pleadings and proofs, thirty dollars.

In all cases determined by final decree on bill and answer, plea or demurrer, twenty dollars.

In all cases where the decree is taken on the bill taken as confessed, or where the bill is voluntarily dismissed by complainant after appearance and before the cause is at issue, fifteen dollars.

Upon all special motions, such sum, not exceeding ten dollars, as the court shall deem just. When a bill is dismissed for default at the hearing, or for want of prosecution, or voluntarily by the complainant, after the same is at issue, the defendant shall be entitled to the same costs as if the cause had been heard.

When the bill is dismissed upon payment of the claim or performance of the relief sought before decree, the complainant shall be entitled to the same costs as if the case had been heard. If such payment or performance is made before plea, demurrer or answer, the costs shall be as on bill taken *pro confesso*; if after any pleading is put in and before proofs, they shall be as on a hearing upon pleadings; and if proofs are taken, the costs shall be as on a hearing upon pleadings and proofs.

In divorce cases the costs shall be under the direction of the court.

Where there are several defendants entitled to costs, the costs granted by this rule shall be apportioned among them as the court may deem proper. [Substitute for former Rule 90.]

RULE 23.

Taxation of Costs.

The register of the court shall have power to tax the costs in a cause, including his own fees therein, subject to re-taxation by the court on motion of either party. But on such re-taxation, no affidavit or objection which was not presented to the register shall be heard or allowed. [Substitute for former Rule 89.]

RULE 24.

Enrollment of Decree, etc.

(a) No process shall be issued or other proceedings had on any final decree, to enforce the same, until the same is duly enrolled pursuant to statute. [From former Rule 80.]

(b) The register shall include in such enrollment all papers filed in the cause. [See Sec. 6648, How. Stat.]

(c) If the decree authorizes the sale of real estate, notice of such sale may be given in advance of such enrollment, but no conveyance shall be executed by a commissioner or other officer on such sale until such enrollment is had. [From former Rule 80.]

RULE 25.

Application for Rehearing.

(a) A petition for a rehearing shall state the special matter or cause on which such rehearing is applied for, and the particular points in which the decree or order is alleged to be erroneous, but it shall not be necessary to state the proceedings anterior to such decree or order sought to be reversed; and the facts, if they do not appear from the records of the court, shall be verified by affidavit of the party, or of some other person. It shall also be accompanied by the certificate of two

counsel that they have examined the case, and that in their opinion the decree or order is erroneous in the particulars mentioned in the petition. And a copy of the petition, with usual notice of presenting the same, shall be served on the adverse party, but the rehearing shall not be considered as a matter of course in any case. [Former Rule 81.]

(b) If a rehearing is granted, the petitioner shall lose the benefit thereof, unless he shall, within ten days thereafter, deposit with the register fifty dollars, to answer the costs and damages of the adverse party, if the decree or order shall not be materially varied. [Former Rule 83.]

RULE 26.

Bills of Revivor and Supplemental Bills.

It shall not be necessary, in any bill of revivor or supplemental bill, to set forth any of the statements in the original suit, unless the special circumstances of the case require it. [Former Rule 44.]

RULE 27.

Bills of Review.

On filing a bill of review, or other bill in the nature of a bill of review, the complainant shall make the like deposit, or give security to the adverse party in the same amount which is or would be required on an appeal from an order or decree complained of; and no such bill shall be filed, either upon the discovery of new matters or otherwise, without special leave of the court first obtained, nor unless the same is brought within the time allowed for bringing an appeal, except upon newly discovered facts or evidence, unless upon reasons satisfactory to the court. [Former Rule 101.]

RULE 28.

Practice Peculiar to Foreclosure Cases.

(a) In a bill for foreclosure or satisfaction of a mortgage, it shall not be necessary to set out at large the rights and interests of the several defendants who are purchasers of, or who

have liens on, the equity of redemption in the mortgaged premises, subsequent to the registry or recording of complainant's mortgage, and who claim no right in opposition thereto; but it shall be sufficient for the complainant, after setting out his own right and interest in the premises, to state generally that such defendants have or claim some interest in the premises, as subsequent purchasers or incumbrancers, or otherwise. [Former Rule 91.]

(b) If a bill to foreclose a mortgage is taken as confessed, or the right of the complainant, as stated in his bill, is admitted by the answer, he may have an order of course, referring it to a commissioner to compute the amount due to the complainant and to such of the defendants as are prior incumbrancers of the mortgaged premises. [From former Rule 92.]

(c) If the defendant is an infant, and has put in a general answer by his guardian, or any of the defendants are absentees and have not been personally served, the complainant may have a similar order of course, referring it to a commissioner to take proof of the facts and circumstances stated in the complainant's bill, and to compute the amount due on the mortgage, preparatory to the hearing of the cause. But every such cause shall be regularly brought to hearing at term after the coming in of the commissioner's report, before a final decree is entered therein. [From former Rule 92, with clause added.]

(d) If the bill has been taken as confessed, the complainant shall show to the court, at the hearing, by affidavit, that the proceedings to take the bill as confessed have been regular, according to the rules and practice of the court, and whether the bill has been taken as confessed against all of the defendants upon service of *subpœna*, or after an appearance, or whether some of them have been proceeded against as absentees. [From former Rule 92.]

(e) Sales under decrees of foreclosure shall not be ordered on less than six full weeks or forty-two days' notice, and publication shall not commence until the time fixed by decree for payment has expired, nor within a year after commencement of suit. [From former Rule 92.]

(f) On the coming in and confirmation of the commissioner's report of the sale of mortgaged premises, if it shall appear there is any surplus money remaining in court after satisfying

the amount due the complainant, any defendant, upon filing an affidavit that such surplus has been paid into court, and that he is entitled to the same, or some part thereof, may have an order of course, referring it to a commissioner to ascertain and report the amount due to such defendants, or to any other person, and which is a lien upon such surplus moneys; and to ascertain the priorities of the several liens thereon, to the end that on the coming in and confirmation of the report, such further order and decree may be made by the distribution of surplus moneys as may be just; and every defendant who has appeared in the case, and every person who has left a written notice of his claim to such surplus moneys with the register, with whom the same are deposited, shall be entitled to notice to attend the commissioner on such reference. And any person making a claim to such surplus moneys, and who shall fail to establish his claim on the hearing before the commissioner, may be charged with such costs as the other parties have been subjected to by reason of such claim; and the parties succeeding on such reference may be allowed such costs as by the court may be deemed reasonable; but no costs unnecessarily incurred on such reference, or previous thereto, by any of the parties, shall be allowed on taxation or paid out of such surplus. [Former Rule 93.]

RULE 29.

Practice Peculiar to Divorce Cases.

(a) All bills for the purpose of obtaining divorce, whether the husband or wife is complainant, shall be duly verified by oath, in the usual manner of verifying bills, where, by the course and practice of the court, an oath is required. In a bill for a divorce on the ground of adultery, the complainant must also positively aver that the adultery charged in the bill was committed without the consent, connivance, privity or procurement of the complainant; and that the complainant has not voluntarily cohabited with the defendant since the discovery of such adultery. And in all such bills, and in all bills for divorce upon any ground, the complainant shall also positively aver that the act done or charged in the bill for which divorce is sought was committed without the consent, connivance,

privity or procurement of the complainant; and that such bill is not founded on or exhibited in consequence of any collusion, agreement or understanding whatever between the parties thereto, or between the complainant or any other person. [Former Rule 95.]

(b) If any such bill is taken as confessed, or the facts charged therein are admitted by the answer, the complainant may have an order of course entered or filed for reference to a commissioner, to take proof of all the material facts charged in the bill, and to report such proof to the court, with his opinion thereon. [From former Rule 96.]

(c) If such bill is taken as confessed, the complainant shall show to the court by affidavit whether or not the defendant was personally served with process or order of appearance, and that the proceedings to take the bill as confessed have been regular according to the rules and practice of the court.

(d) No sentence or decree of nullity declaring void a marriage contract, or decree for a divorce, or for a separate or limited divorce, shall be made of course by the default of the defendant; or in consequence of any neglect to appear at the hearing of the cause, or by consent. And every such cause shall be heard after the trial of the issue, or upon the coming in of the commissioner's report, at a stated term of the court. [Former Rule 98.]

RULE 30.

Practice Peculiar to Creditors' Bills.

(a) A creditor's bill, to reach equitable interests of a debtor shall show the true sum actually and equitably due the complainant on his judgment or decree, over and above all just claims of the debtor by way of set-off or otherwise, and that the debtor has equitable interests, exceeding one hundred dollars in value, which the complainant is unable to reach by execution, which has been duly issued and returned unsatisfied, and that the bill is not exhibited by collusion with the defendant, or for the purpose of protecting the property or effects of the debtor against the claims of other creditors, but for the sole purpose of compelling payment and satisfaction of the complainant's own debt. [Substitute for former Rule 102.]

(b) When the complainant in such creditor's bill shall have a right by statute to a discovery and disclosure of facts from the defendant, the defendant shall in his answer fully and explicitly set forth the particular facts called for. If he fail so to do, the complainant may have his right to a further answer and disclosure determined by the court on special motion, and the court may enforce its order thereon by the attachment of the defendant, and may strike such insufficient answer from the files.

(c) Every such creditor's bill shall be verified as provided by rule. [From former Rule 103.]

(d) The proceedings in such a suit shall, except as otherwise provided by rule or statute, be governed by the general chancery rules, and the court may appoint a receiver therein pending the determination of the suit, when it shall be deemed necessary for the protection of the rights of the complainant.

RULE 31.

Receivers—Their Powers and Duties—Practice.

(a) Every receiver of the property and effects of the debtor, appointed in a suit upon a creditor's bill, shall, unless restricted by the special order of the court, have general power and authority to sue for and collect all the debts, demands and rents belonging to such debtor, and to compromise and settle such as are unsafe and of a doubtful character. He may also sue in the name of the debtor, where it is necessary or proper for him to do so, and he may apply for and obtain an order of course that the tenants of any real estate belonging to the debtor, or of which he is entitled to the rents and profits, attorn to such receiver and pay their rents to him. He shall also be permitted to make leases from time to time as may be necessary, for terms not exceeding one year. And it shall be his duty, without unreasonable delay, to convert all the personal estate and effects into money; but he shall not sell any real estate of the debtor without the special order of the court. He is not to be allowed for the costs of any suit brought by him against an insolvent from whom he is unable to collect his costs, unless such suit is brought by order of the court, or by the consent of all persons interested in the funds in his hands.

But he may sell such desperate debts, and all other doubtful claims to personal property, at public auction, giving at least ten days' notice of the time and place of such sale. [Former Rule 106.]

(b) Where several bills are filed by different creditors against the same debtor, no more than one receiver of his property and effects shall be appointed, unless the first appointment has been obtained by fraud or collusion, or unless the receiver is an improper person to execute the trust. The receiver shall give security sufficient to cover the whole property and effects of the debtor which may come into his hands by virtue of his office; and he shall hold such property and effects for the benefit of all creditors who have commenced, or shall commence, similar suits, during the continuance of his trust, to be disposed of according to their legal or equitable priorities. He shall not pay over the funds in his hands to the parties, or to any other person, without being specially authorized to do so by an order or decree of the court; nor shall he be discharged from his trust without special order, to be obtained upon a written consent of all the parties interested in the property in his hands, or upon notice of the application. [Former Rule 107.]

(c) When another suit is commenced after the appointment of a receiver the same person may be appointed receiver of such subsequent suit, and shall give such further security as the court shall direct. He shall keep a separate account of any property or effects of the debtor which may have been acquired since the commencement of the first suit, or which may be assigned to such receiver under the appointment in the last cause. [Former Rule 108.]

RULE 82.

Moneys in Hands of Register of Court—How Deposited and Drawn.

(a) The accounts of the register with the banks in which the moneys are directed to be deposited shall be kept in such a manner that in the cash books of the banks, and in the bank books of the register, it shall appear in what particular suit, or on what account, the several items of money credited or charged were deposited or paid out. [Former Rule 87.]

(b) Orders upon the banks for the payment of moneys out of court shall be made payable to the order of the person entitled thereto, or of his solicitor or his attorney duly authorized, and shall specify in what particular suit, or on what account, the money is to be paid out, and the time when the decree or order authorizing such payment was made. [Former Rule 88.]

RULE 33.

Security by Guardian *ad Litem*, etc.

No guardian *ad litem* for an infant defendant, or next friend of an infant complainant, unless he has given security to the infant according to law, shall, as such guardian, receive any money or property belonging to such infant, or which may be awarded to him in the suit, except such costs and expenses as may be allowed by the court to the guardian out of the fund or received by the infant in the suit. Neither shall the general guardian of an infant receive any part of the proceeds of the sale of real property belonging to such infant, sold under a decree or order of the court, until the guardian has given such further security for the faithful discharge of his trust as the court may direct. [Former Rule 94.]

RULE 34.

Assignment by Complainant of Subject-matter of Suit— Proceedings Thereon.

Whenever the complainant in a chancery suit, wherein the right is under existing rules of law and equity assignable, shall have transferred his interest in the subject-matter of the litigation, either voluntarily or by process of law, the suit shall not thereby be abated, but the transferee may present his petition to the court in which said suit is pending, setting up the fact of such transfer, and asking to be substituted as complainant in said suit. The facts, if they do not appear from the records of the court, shall be verified by the affidavit of the party or some other person. If at the hearing it appear to the court that such transfer has been made, an order shall be made substituting the transferee as complainant in said suit, and said suit shall continue for the benefit of said transferee

as though no transfer had been made. A copy of the petition and affidavits, with the usual notice of presenting the same, shall be served on the defendant or his solicitor; and in making such order the court may, in its discretion, require the transferee to file security for costs. [Former Rule 125.]

RULE 35.

General Practice of Court.

In cases where no provision is made by statute or by these rules, the proceedings of this court shall be according to the customary practice, as it has heretofore existed in cases not provided for by statute or the written rules of the court.

RULE 36.

When Rules to Take Effect.

These rules shall take effect January 1, 1897, as to all causes commenced on and after that date, and also as to any cause commenced previous to that date, so far as concerns proceedings therein subsequent to the date when the same shall be at issue. All rules not herein contained are hereby repealed, except as above provided.

SECTION II.

LAW RULES MADE APPLICABLE IN CHANCERY CAUSES.

The following rules governing in cases at law are, by Chancery Rule 15,¹ made applicable in chancery causes.

LAW RULE 11.

Common and Special Orders and Rules.

(a) Every rule to which a party would, according to the practice of the court, be entitled of course, without showing special cause, shall be denominated a common rule; and every other rule shall be denominated a special rule. All common rules and all rules by consent of parties shall be entered with the clerk at his office, in a book to be provided by him for that purpose, to be called "Common Rule Book," and may be

¹ See page 757, *ante*

entered at any time, as well in vacation as during term; and the day when the rule shall be entered shall be noted therein, and the party may enter such rule as he may conceive himself entitled to of course, but at his peril. [Former Rule 14.]

(b) Except as required by statute, such rules may be filed with the clerk with the like effect as if entered as above provided.

(c) All orders made by the direction of the court shall be entered in the record of the proceedings of the court, and all orders made by the judge at chambers shall be signed by the judge and filed in the cause.

LAW RULE 16.

Notes of Issue.

(a) The party noticing a cause for trial shall, at least twelve days before the first day of the term, file with the clerk a note of issue, giving the title of the cause, the names of the attorneys, the date of joining issue or of filing appeal, and the cause of action. If a jury has previously been demanded the same shall also appear in the note of issue. Provided, that, in the court's discretion, for cause shown, the court may, not later than the first day of the term, add to the term calendar a cause which has been regularly noticed for trial, although a note of issue was not filed. And in appeal causes, the note of issue shall be filed eight days before the first day of the term.

(b) The prosecuting attorney shall, at least four days before the first day of term, deliver to the clerk a list of all such criminal cases as he intends to bring on to trial, or in which any action of the court may be required.

LAW RULE 18.

Term Calendar—How Made Up.

(a) Previous to each term the clerk shall prepare a calendar of causes for the term. The same shall be made up in the following order: 1. Criminal cases. 2. Jury civil cases. 3. Non-jury civil cases. 4. Issues of law. 5. Chancery cases, including issues of law in such cases.

(b) Criminal cases shall have precedence. Jury and non-

jury and chancery cases shall have precedence in the order of the respective dates of joining issue, or, in appeal causes, the respective dates of filing the appeal. [Substitutes for former Rule 58 and Chancery Rule 63.]

LAW RULE 19.

Motions and Petitions.

(a) All petitions and special motions (except motions for continuance and motions to strike causes from calendar) shall be in writing and shall be signed by the attorney, or counsel, of the party in whose behalf the same are entered, and shall set out briefly but distinctly the grounds upon which the same are founded, and with the affidavits supporting the same shall be filed in the office of the clerk of the court on or before the day on which they are noticed for argument.

(b) Notice of the argument of motions and petitions (except motions for continuance and motions to strike causes from calendar), together with a copy thereof and of the affidavits on which they are based, shall be served on the opposite attorney at least four days before the time noticed for hearing the same. Provided, that for good cause the court may hear such argument on shorter notice.

(c) Motions and petitions shall be argued on the day for which they are noticed, if the party has an opportunity to be heard on that day, unless the court (or circuit court commissioner, in a matter pending before him) shall otherwise direct. If there is not sufficient time to finish the business noticed for any day, it may be continued from day to day until it is completed; or it may be adjourned to some subsequent day. And motions and petitions which can not be heard on the day for which they are noticed shall, in the absence of special order, stand continued from day to day without any special continuance.

(d) Not more than one counsel on each side shall be heard on the argument of any petition or motion, the mover being entitled to open the argument and to reply to the argument of the opposite counsel. [Substitutes for former Rules 28, 29, 30, 33, 64, 72 and 73, and former Chancery Rules 5 and 61.]

See Rules 21, 22 and 46.

LAW RULE 20.**Stay of Proceedings to Make Motions.**

Whenever a stay of proceedings may be necessary in order to make a special motion, the judge may grant an order for that purpose; and service of such order, with copies of the affidavits on which it is grounded, and the notice of the motion, shall operate as a stay of proceedings until the order of the court is had in the premises, unless the judge shall in the meantime supersede or set aside such order. But the proceedings shall not be stayed for a longer time than to enable the party to make his motion according to the practice of the court, and if made, until the decision of the court thereon. [Former Rule 74.]

LAW RULE 22.**Motions for Continuance.**

(a) No motion for the continuance of a cause made after the first day in term shall be heard, unless a sufficient excuse is shown for the delay, and on a second application by a party for the continuance of a cause, the party so applying shall state, in addition to the usual requisites, the facts which he expects to prove by the absent witness, and shall also state with particularity the diligence he has used to procure his attendance. In case it is admitted by the opposite party in a civil cause that the witness named would, if placed on the stand, testify as stated in such affidavit, the motion for a continuance shall be denied, unless the court, for the furtherance of justice, shall deem a continuance necessary. [Former Rule 55.]

(b) If the party receiving notice of trial shall serve a notice on the opposite party that he will move for a continuance of the cause at the term for which it is noticed, together with a copy of the affidavits upon which he intends to found the motion, he shall not be liable to such party for any costs of preparing to try the cause, accruing after the service of such notice and affidavits, in case a continuance is granted on the papers so served, excepting such as may be unavoidable. [Former Rule 56.]

(c) When a continuance is granted upon payment of costs,

such costs may be taxed summarily by the court, and on being taxed, shall be paid on demand of the party, his agent or attorney; and if not so paid, on affidavit of the fact, such continuance may be vacated, or the court may grant an attachment therefor, with the accruing costs. [Substitute for former Rule 57.]

LAW RULE 23.

Genuineness of Documents.

Either party may exhibit to the other, or to his attorney, at any time before the trial, any paper material to the action, and request an admission in writing of its genuineness. If the adverse party, or his attorney, fail to give the admission within four days after the request, and the delivery to him of a copy thereof, if such copy be required, and if the party exhibiting the paper be afterward put to expense in order to prove its genuineness, and the same be finally proved or admitted on the trial, such expense, to be ascertained and summarily taxed at the trial, shall be paid by the party refusing admission, unless it shall appear to the satisfaction of the court that there were good reasons for the refusal, and an attachment or execution may be granted to enforce the payment of such expenses.

LAW RULE 25.

Court May Require Parties, etc., to Testify.

In any suit, whether contested or not, the court may, for the furtherance of justice, call upon any or all of the parties to such suit, or any witness therein, to testify orally in open court, and may continue or keep open the cause for that purpose, and may issue process to compel the appearance of such party or witness before the court. [Substitute for former Law Rule 48 and former Chancery Rule 99.]

LAW RULE 28.

Service of Papers.

When the attorney for the adverse party resides or has his office in the same city, village or township as the attorney making the service, papers shall be served as follows:

- (a) By delivering the same to the attorney personally.
- (b) Or, by leaving the same in his office with his clerk, or with a person having charge thereof.
- (c) Or, when no person is to be found in his office, by leaving the same, between the hours of six in the morning and nine in the evening, in some suitable and conspicuous place in such office.
- (d) Or, if the office be not open, so as to admit of service therein, then by leaving the same at the residence of the attorney with some person of suitable age and discretion.
- (e) Or, by depositing the same in the postoffice of the city, village or township, enclosed in an envelope, plainly addressed to such attorney, with postage fully prepaid. [Substitute for former Rule 7.]

LAW RULE 29.

Service of Papers by Mail.

When the attorney resides or has his office in a different city, village or township than the attorney making the service, papers shall be served as follows:

- (a) By delivering the same to the attorney personally, or by leaving the same in his office with his clerk or with a person having charge thereof.
- (b) Or, by depositing the same in some postoffice directed to the attorney at his business address, with postage fully prepaid, such address to be ascertained according to the best information and belief of the person making such service. And in such case the time of service must be increased one day for every one hundred miles distance, or fraction thereof, between the place of deposit and the place of address. [From former Rules 5 and 9.]

LAW RULE 30.

Service Where There are Several Defendants or Several Attorneys.

- (a) In cases where there are two or more defendants, who appear by different attorneys, service of all papers in behalf of the plaintiff shall be made on the attorney for each of the other defendants.

(b) And in such case service of all papers in behalf of any defendant shall be made on the attorney for each of the other defendants, and upon the attorney for the plaintiff.

(c) In case two or more attorneys appear for the same party or parties, service on any one of the said attorneys, whether they be partners or not, shall be sufficient. But this shall not apply to attorneys appearing as "counsel" only.

LAW RULE 31.

Service on Party Prosecuting or Defending in Person.

When a party prosecutes or defends his cause in person, service of papers may be made on him in the manner hereinbefore provided for service on attorneys, whether such party be a licensed attorney or not. [From former Rules 6 and 8.]

LAW RULE 32.

Service in Exceptional Cases.

In all cases where service of papers can not reasonably be made on account of the lack of a solicitor of record, or the inability to find a party, or for any other reason, the court in which such cause is pending, or judge thereof at chambers, upon an *ex parte* application, on cause shown, may direct in what manner and on whom service may be had, and on whom service may be made. [From former Rule 6.]

LAW RULE 34.

Service on Party Charged with Contempt and on Party Imprisoned.

(a) When the object is to bring the party into contempt for disobeying any order of the court, the service shall be on such party personally, unless otherwise specially ordered by the court.

(b) When the defendant is returned imprisoned for want of bail, a copy of the declaration shall be delivered to him or to the sheriff or jailer in whose custody he shall be, and when an exception is entered to bail, and no notice of retainer of an attorney to defend is given, notice of such exception shall be

delivered to the sheriff or one of his deputies. [From former Rules 6 and 8.]

LAW RULE 35.

When Service Required.

No service of papers shall be necessary on a defendant who has not regularly appeared, except as specially required by rule or statute. But a defendant who has appeared by notice of retainer or appearance shall be entitled to notice in advance of all future proceedings in the cause, although he may not have followed his appearance by plea or demurrer. [From former Rule 8.]

LAW RULE 36.

How Time Computed on Service of Papers, etc.

(a) The day on which any rule shall be entered, or order, notice, pleading or paper served, shall be excluded in the computation of the time for complying with the exigency of such rule, order or notice, pleading or paper, and the day on which a compliance therewith is required shall be included, except where it shall fall on Sunday, in which case the party shall have the next day to comply therewith.

(b) When, by the terms of any order, an act is directed to be performed instanter, it shall be done within twenty-four hours. [From former Rule 15.]

LAW RULE 37.

Entitling Papers, etc.

(a) All papers and the copies thereof for service shall be fairly and legibly written or printed, and be indorsed as hereinafter provided, and the clerk shall not file such as do not conform to this rule.

(b) All papers, except process and pleadings, by which the cause is commenced, shall be entitled in the court and cause, and the plaintiff's name shall be placed first. Provided, that affidavits annexed to and referring to another paper which is properly entitled in the court and cause need not be entitled.

(c) In cases where there are two or more plaintiffs, or two

or more defendants, it shall be sufficient in entitling papers to name the first-named plaintiff and the first-named defendant with the usual indication of other parties, provided there be added the official number of the cause. Provided, further, that in all orders and notices required to be published the full names of all parties shall appear in the title of the cause.

(d) All papers for filing or service shall also contain on the outside an abbreviation at least of the title of the court and cause and the character of the paper. [Substitute for former Chancery Rule 67.]

LAW RULE 38.

The Court Files.

The clerk shall indorse on every paper the day on which the same is filed, and shall not suffer or permit any writ, pleading, affidavit, deposition, or other paper whatever on file in his office, to be taken therefrom without the order of the court or a judge thereof; but parties interested in any such may inspect the same in his office, and take copies thereof. [Former Rule 75.]

LAW RULE 39.

Agreements to be in Writing.

No private agreement or consent between the parties to a cause, or their attorneys respecting the proceedings in a cause, which shall be denied by either party, shall be binding, unless the same shall have been made in open court, or unless evidence thereof shall be in writing subscribed by the party or his attorney against whom the same is alleged. [Substitute for former Rule 12 and Chancery Rule 84.]

LAW RULE 40.

Affidavit of Genuineness of Acceptance of Service.

When a defendant accepts or acknowledges in writing the service of any process, pleading or notice, and an affidavit is filed therewith, showing the genuineness of his signature, the same shall have the same effect as a return or other legal proof of service. [Former Rule 11.]

LAW RULE 41.**Depositions.**

(a) When a deposition has been taken by either party, it may at any time be read by the other party on the trial.

(b) Objections to notices of, or objections to the manner of taking the testimony, or of certifying or returning the deposition, shall be regarded as waived, unless made in writing within three days after knowledge or notice of the return thereof.

LAW RULE 43.**Compelling Return of Process.**

If any sheriff or coroner shall fail to return any process to him directed and delivered, on or before the return day therein specified, any party interested in procuring a return may cause a rule to be filed or entered in the book of common rules, requiring such officer to return the process within five days after service of notice of such rule; and if such process be not returned within the time specified in such rule, on filing with the clerk an affidavit of the service of such notice, and of the delivery of such process to such officer to be served, the default of such officer in not making such return may be entered, and thereupon an attachment may be issued of course against such sheriff or coroner to compel such return. [Substitute for former Rule 96, as amended April 23, 1889.]

CHAPTER LIII.

MISCELLANEOUS FORMS.

During the preparation of this edition, want of space, in order to complete it in one volume, has been constantly apprehended, and many forms were not added where they were desirable, and properly belong. Not unmindful that this work is already of unusual size, the author has ventured to insert the following under the head of "Miscellaneous Forms:"

No. 279. Introduction to bill in equity in United States Court.

To the judges of the Circuit Court of the United States, for the District of —:

A B, of —, and a citizen of the State of — brings this his bill against C D, of —, and a citizen of the State of —. And thereupon your orator complains, and says that, etc.

No. 280. Interrogating part to bill in United States Court.

To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer, that is to say:

No. 281. Order where defendant appears or is brought into court by attachment and admits his contempt, that he put in his answer within a specified time.

(Caption, with title of cause as in No. 204, ante, page 510.)

It appearing to the court that the defendant C D being in contempt for not appearing or answering to the bill of complaint in this cause, a writ of attachment had issued against him, directed to the sheriff of the county of —, returnable *forthwith*; whereupon the sheriff has returned that he had attached the defendant C D, and had him in custody before the court; and the said C D now being before the court, and consenting to put in his answer in this suit, and to pay the costs of his contempt when duly taxed,

on motion of Mr. —, solicitor for the complainant, it is ordered that the said C D put in his answer to the bill of complaint within — days from the date of this order, or that the complainant may apply to this court for such further order as may be just.

No. 232. Order for commitment of defendant for disobeying order to put in his answer.

Caption, with title of cause as in No. 204, ante, page 510.)

An order having been entered in this cause on the — day of —, 18—, requiring the defendant C D to put in his answer to the bill of complaint within — days from the date of said order, or that in default thereof the complainant might be at liberty to apply to this court for such further order as might be just; and it appearing to the court that the defendant C D has failed to put in his answer as required by said order, and this court now adjudging the said C D to have been guilty of the misconduct alleged, and that such misconduct was calculated to, or did actually defeat, impair, impede or prejudice the rights or remedies of the complainant in this cause, it is thereupon, on motion of Mr. —, solicitor for the complainant, ordered that the said C D be, and he is hereby ordered to stand committed to the common jail of the county of —, there to remain charged upon this contempt until he shall have put in his answer as aforesaid; unless the court shall see fit sooner to discharge him. And it is further ordered that a warrant issue for that purpose.

No. 233. Affidavit to obtain an attachment against the defendant for not answering.

(Title of cause as in No. 204.)

A B, the above named complainant, on oath states, that a discovery is necessary in this cause from the defendant, as to the matters of the said bill of complaint, and the several interrogatories therein contained.

A B.

Subscribed, etc.

No. 234. Order for an attachment for not answering.

(Caption, with title of cause.) It appearing to the court that the defendant herein was duly served with summons in this cause, more than ten days before the first day of the present term of this court, to appear, except, demur, plead or answer the complainant's said bill of complaint; and it further appearing to the court that the defendant has failed (*or refused*) to appear or answer the said bill of complaint, as required by law; on motion of Mr. —, solicitor for the complainant, it is ordered, that an attachment be, and the same is hereby, awarded against the said defendant, C D, returnable forthwith.

No. 235. Order in case of contempt, for not answering, where defendant denies his contempt, directing the filing of interrogatories, etc.

(Caption, with title of cause as in No. 204, ante, page 510.)

It appearing to the court that the defendant C D being in contempt for

not appearing or answering to the bill of complaint in this cause, a writ of attachment had issued against him, directed to the sheriff of the county of —, returnable *forthwith*; whereupon the sheriff has returned that he had attached the defendant C D, and had him in custody before the court; and the said C D, being now before the court, and denying that he is guilty of the misconduct alleged against him; it is ordered that the complainant do within — *days* file with the register of this court, interrogatories specifying the facts and circumstances alleged against the said C D; and that he serve a copy thereof on the said C D; and that the said C D put in written answers to such interrogatories, upon oath, and file the same within—*days*, after the time when such interrogatories are served on him, in the office of the register of this court. And it is further ordered, that it be referred to J M D, a commissioner of this court, to examine the said C D, on oath, upon the said interrogatories; and to take such further proofs as either party may produce before him in relation to the alleged contempt; and that he report such answers and proofs to this court. And it is further ordered that the said defendant be let to bail in the sum of — dollars; and that the said C D attend, from day to day, before this court, until the further order of the court.

On a reference of this nature the commissioner is not authorized to receive the *ex parte* affidavits of witnesses, unless the order of reference expressly authorizes him to do so. The parties must produce and examine the witnesses before the commissioner, so that they may be cross-examined by the adverse party.¹

No. 286. Order convicting defendant of a contempt after his examination upon interrogatories.

(Caption and title of cause as in No. 204, ante, page 510.)

A writ of attachment having been heretofore issued out of and under the seal of this court, against the defendant, C D, for his contempt in not answering the complainant's bill, directed to the sheriff of the county of —, and returnable *forthwith*; and the said sheriff having returned that he had attached the said C D, and taken his body, and had him in custody before the court; and the said C D having been by virtue of such attachment personally before the court, on the said — day of — instant, and denying the alleged contempt, it was thereupon ordered that the complainant in this cause, should, within — *days*, file in the office of the register of this court interrogatories specifying the facts and circumstances alleged against the said C D; and that he serve a copy thereof on the said C D; and that the said C D should put in written answers to such interrogatories, upon oath, and file the same within — *days* after the service of such interrogatories; and that it should be referred to J M D, a commissioner of this court, to examine the said C D, on oath, upon such interroga-

¹ *Cumming v. Wagoner*, 7 Paige Ch. 603.

tories, and to take such further proofs as either party might produce before him in relation to the alleged contempt; and it now appearing to the court from the report of the said commissioner, and the answers and proofs thereto annexed, that the said C D has committed the contempt with which he is charged, and this court now adjudging him to have been guilty of the misconduct alleged, and that such misconduct was calculated to, or did actually defeat, impair, impede or prejudice the rights of the complainant in this cause, it is therefore ordered, that a fine of — dollars be, and the same is hereby imposed upon the said C D for his said misconduct. And it is further ordered, that the said C D do pay to the said complainant the costs and expenses of the proceedings for such misconduct, and now taxed at the sum of — dollars. And it is further ordered, that the said C D be, and he is hereby, directed to stand committed to the common jail of the county of —, there to remain charged with this contempt until he shall have fully answered the said bill of complaint, and paid such fine and costs; unless the court shall see fit sooner to discharge him. And that a warrant issue for that purpose.

Upon this order a *mittimus*, or warrant of commitment for contempt in not appearing, will issue.

No. 287. Order to refer second or third answer on the old exceptions.

(Caption and title of cause as in No. 204, ante, page 510.)

Exceptions having been heretofore taken to the answer of the defendant C D, and such answer having been reported insufficient in the matters of the first and fourth exceptions, the defendant has put in a second (or third) answer to the bill in this cause; which answer the complainant alleges to be insufficient in the matters of the said first and fourth exceptions. It is therefore ordered that it be referred to J M D, a commissioner of this court, to whom such exceptions were originally referred, to look into the bill of complaint, the answer of the defendant, and the said first and fourth exceptions, and to report whether such second (or third) answer is sufficient in the matters of the exceptions, or not.

No. 288. Order for sheriff acting as sergeant-at-arms.

(Caption and title of cause as in No. 204, ante, page 510.)

The defendant C D, being in contempt for not appearing and answering to the bill of complaint in this cause, and a commission of rebellion having been heretofore issued out of and under the seal of this court, directed to certain commissioners therein named, commanding them to attach the said C D as a rebel and contemner of the law, and to have him before this court on the — day of — instant; and the said commissioners having returned that they had made diligent search and inquiry after the said C D so as to attach his body by virtue of the said commission, but that notwithstanding all their endeavors they could not meet with him for that purpose, as by such commission and the return thereto appears. It is thereupon ordered that the sheriff of the county of —, now attending this court at its present term, and executing all the powers and duties of a *sergeant-at-arms*, do forthwith

go and take the said C D into his custody, and him safely keep, and bring him immediately into this court, before the court, to answer for his contempt, and to do and receive what this court shall thereupon further order in the premises. And it is further ordered that the said sheriff do with all convenient speed certify to this court, under his hand, his doings in the premises.

Upon this order a warrant to the sheriff acting as *sergeant-at-arms* will issue.

No. 289. Order for a sequestration.

(Caption and title of cause as in No. 204, ante, page 510.)

The defendant being in contempt for not appearing and answering the bill of complaint in this cause, and a warrant having been issued to the sheriff of the county of —, attending this court at its *present* term, and as such, executing all the duties of a *sergeant-at-arms*, requiring him forthwith to go and take the said C D into his custody and bring him into this court to answer for his contempt, in pursuance of an order of this court made on the — day of —; and the said sheriff, acting as *sergeant-at-arms*, having returned that he had made diligent search and inquiry after the said C D, but that he did so abscond and secrete himself that he could not be found to be apprehended, as by the said warrant and the return thereof appears; it is therefore ordered that a commission of sequestration do issue against the said C D, directed to E F, G H and J K, commissioners, directing them to sequester the defendant C D's personal estate, and the rents, issues and profits of his *real* estate, until the defendant C D shall appear to the bill of complaint in this cause, clear his contempt, and this court shall make an order to the contrary.

Upon this order being made, a writ of sequestration will issue.

No. 290. Order of reference when defendant does not submit to answer exceptions.

(Caption and title of cause as in No. 204, ante, page 510.)

Exceptions for insufficiency having been filed to the answer of the defendant C D on the — day of — *last*, and the said C D not having submitted to answer said exceptions, it is ordered that it be referred to J M D, a commissioner of this court, to look into said bill and answer of the defendant C D, and such exceptions, and report whether said exceptions are well taken or not.

No. 291. Order for further answer after report of commissioner.

(Caption and title of cause as in No. 204, ante, page 510.)

The answer of the defendant C D having been reported insufficient in the matters of the first and fourth exceptions thereto, by the commissioner to whom the exceptions of the complainant to such answer were referred, and the report of the said commissioner being approved by the court, against

the defendant C D, it is therefore ordered that the said C D put in a further answer to the matters of the said first and fourth exceptions within — days from this date, and pay the costs of such exceptions.

No. 292. Order for an attachment on third answer being held insufficient.

(Caption and title of cause as in No. 204, ante, page 510.)

The third answer filed by the defendant C D having been reported insufficient, on a reference to the commissioner upon the original exceptions, in the matters of the first and fourth exceptions, and the report of said commissioner having been filed and having become absolute, it is ordered that an attachment issue against the defendant C D.

No. 293. Order for examination of defendant on interrogatories, etc., on third answer being held insufficient.

(Caption and title of cause as in No. 204, ante, page 510.)

The third answer of the defendant C D having been reported insufficient, on a reference to the commissioner upon the original exceptions, in the matters of the first and fourth exceptions, and the report of the said commissioner having been filed, and having become absolute, an attachment was thereupon issued against the said C D in pursuance of an order of this court rendered on the — day of — last. And the said C D, now being personally before the court by virtue of the said attachment, and this court now adjudging the defendant to have been guilty of the misconduct alleged, and that such misconduct was calculated to or actually did defeat, impair, impede or prejudice the rights or remedies of the complainant in this cause, it is therefore ordered that the said C D be examined upon interrogatories before J M D, a commissioner of this court, as to the points wherein his said third answer is reported insufficient; and that he stand committed to the common jail of the county of — until he shall have answered such interrogatories to the satisfaction of the said commissioner, and paid the costs incurred by reason of his default, now taxed at — dollars; and that a warrant issue for that purpose. And it is further ordered, that the sheriff of said county do keep the defendant in his actual custody until the court shall have made some order in the premises, and that he take the said C D before the said commissioner to be examined, at such times as such commissioner shall appoint.

No. 294. Order for leave to amend bill after a plea to part is allowed.

(Caption and title of cause as in No. 204, ante, page 510.)

The plea of the defendant C D to the bill of complaint in this cause having been, on argument, allowed as to part of said bill, on motion of Mr. — of counsel for the complainant, it is ordered that the complainant have leave to amend said bill by, etc. *(Here state the manner in which it is to be amended,)* upon payment of costs to be taxed. It is further ordered that such amendment be filed with the clerk of this court within — days from this date.

No. 295. Order of reference to the commissioner.

(Proceed as in No. 84, ante, page 147, and continue): That this cause be, and the same is hereby, referred to J M D, a commissioner of this

court, to inquire and state to the court, etc. (*Here insert the subject-matter of reference*); and for the better discovery of the matter aforesaid, the parties respectively are to produce before the said commissioner all deeds, books, papers and writings in their possession, custody or power relating thereto, and are to be examined upon oath and interrogatories as the said commissioner shall direct; and the said commissioner will cause to come before him all such witnesses whose testimony he may deem necessary, and examine them upon oath and interrogatories touching the matters aforesaid; and the said commissioner will make his report thereon with all convenient speed; and if any special questions shall arise, the said commissioner is at liberty to state the same to the court.

No. 296. Order of reference of a plea of former suit pending.

(*Caption and title of cause as in No. 204, ante, page 510.*)

On filing a plea in this cause, averring that there is a former suit depending in this court for the same matters as are involved in the present suit, it is therefore ordered that it be referred to J M D, a commissioner of this court, to look into the bill and the plea in this cause, and the bill in the said plea alleged to have been exhibited by the complainant against the defendant previous to the commencement of this suit, and into the other pleadings and proceedings therein, and to report whether the said plea is true.

No. 297. Order directing plea to stand for an answer.

(*Caption and title of cause as in No. 204, ante, page 510.*)

The plea of the defendant C D to the bill of complaint in this cause having heretofore come on to be argued, and counsel for the respective parties having been heard thereupon, it is ordered that the said plea do stand for an answer, with liberty to the complainant to except thereto.

No. 298. Order allowing the complainant to dismiss his bill.

(*Caption and title of cause as in No. 204, ante, page 510.*)

The complainant applying to dismiss his bill in this cause, on motion of Mr. ———, solicitor for the complainant, it is ordered that leave to dismiss the same be granted accordingly, on the complainant paying to the defendant his costs in this suit, to be taxed.

No. 299. Order to pay money into court.

(*Caption and title of cause as in No. 204, ante, page 510.*)

On reading and filing the bill and answer in this cause, and on motion of Mr. ———, solicitor for the complainant, and on hearing Mr. ———, solicitor for the defendant, in opposition to said motion, it is ordered, that the defendant C D do, within ——— days from the date of this order, pay into the hands of the clerk of this court, in trust in this cause, the sum of ——— dollars, admitted by the answer of the defendant to be due from him; and that when such money is paid in it be deposited by said clerk, in trust, in the ——— bank of ———, to the credit of this cause, there to remain until the further order of this court.

No. 300. Final decree dismissing bill at the hearing.

(*Proceed as in No. 204. ante, page 510, to the *, and continue*): That the complainant's said bill of complaint be and the same is hereby dismissed, with costs to the defendant, to be taxed.

No. 301. Order for cause to stand over to add new parties.

(*Caption and title of cause as in No. 204, ante, page 510.*)

This cause coming on to be heard this day, and counsel for both parties having been in part heard, and it appearing to this court that E F and G H are necessary parties to this cause, it is ordered that this cause do stand over, to the end that the complainant may make the said E F and G H parties thereto, either by amendment or supplemental bill, as he may be advised.

No. 302. Order for cause to stand over to supply proofs.

(*Caption and title of cause as in No. 310, post, page 791.*)

This cause coming on to be heard this day, and counsel for both parties having been in part heard; and it appearing to the court that the complainant has omitted to introduce proof of the death of E F, his intestate, it is ordered that this cause do stand over, to the end that the complainant may examine witnesses to prove the death of such intestate.

No. 303. Interrogatories for the examination of a party in contempt for not answering.

(*Title of cause as in No. 310, post, page 791.*)

Interrogatories to be exhibited on the part of the complainant, for the examination of C D, the defendant in this cause, pursuant to an order made in said cause on the — day of —, 18—:

First. Were you not, on or about the — day of — last, or at any other and what time, duly served with a *summons* in the above entitled cause? When and by whom and how was such service made? Answer this interrogatory fully and particularly.

Second. Is not the writ of *summons* now shown to you, the one served, and a copy of the same left with you? Answer fully.

Third. Were, etc. (*Here insert such additional interrogatories as may be deemed necessary.*)

_____,
Sol. for Complainant.

No. 304. Answer to interrogatories in the last form, No. 303.

(*Title of cause as in No. 310, post, page 791.*)

The answer and examination of C D, the defendant in this cause, to the interrogatories exhibited by the complainant for his examination, pursuant to the order of this court, made in said cause, on the — day of —, 18—.

To the first interrogatory, this defendant answers and says, that, etc.

To the second interrogatory, he answers and says, that, etc. (*and so on*).

C D.

Sworn and subscribed to before me, this — day of —, 18—.

_____,
Master in Chancery.

No. 305. Commissioner's report upon exceptions to answer for insufficiency.

STATE OF MICHIGAN.

The Circuit Court for the County of ———. In Chancery.

A B,	}
Complainant,	
vs.	
C D,	}
Defendant.	

To the Circuit Court for the County of ———. In Chancery.

In pursuance of an order of this court, made in the above entitled cause, on the ——— day of ———, 18—, whereby it was referred to me, a circuit court commissioner of this court, to look into the complainant's bill of complaint, the answer of the defendant C D, and the exceptions taken to said answer by the complainant, and report whether said exceptions are well taken or not.

I, the said commissioner, do hereby respectfully certify and report, that having been attended by the counsel of the respective parties, and having looked into said bill and answer, and the exceptions taken thereto, and having duly considered the same, I find that the first and fourth exceptions to said answer are well taken, and that the second, third and fifth exceptions are not well taken.

All of which is respectfully submitted.

S W O,
Circuit Court Commissioner, ——— County, Michigan.

No. 306. Further answer after exceptions and amendment.

(Title of court and cause.)

The further answer of the defendant C D, to the original bill of complaint; and the answer of the same defendant to the amended bill of the complainant:

This defendant, saving and reserving to himself the same benefit of exception to the said original and amended bill, as by his former answer to the said original bill, is saved and reserved for answer thereto, or so much, etc., (as in No. 66, ante, page 114,) answers and says, etc.

And this defendant, in further answer to such original bill, as to the matters of the first exception taken by the complainant to his former answer, says, etc., (and so on.)

And this defendant, for further answer to the amendments made to such original bill, says, etc.

No. 307. Master's report as to sufficiency of defendant's examination.

(Title of court and cause.)

To the Circuit Court for the County of ———. In Chancery.

In pursuance of an order of this court, made in the above entitled cause on the ——— day of ———, 18—, whereby it was referred to me, a commissioner of this court, to examine the defendant C D, on interrogatories to the points wherein his third answer to the bill in this cause was reported insufficient, I, the said commissioner, do hereby respectfully certify and report that, having been attended by the counsel for the respective parties, and having caused the said C D, to be brought before me, I examined him upon oath upon the written interrogatories filed for that purpose, and also *viva voce*,

and that his examination thereto is contained in a schedule hereto annexed, marked A. And I do further certify and report that, in my opinion, the said examination is sufficient.

All of which is respectfully submitted.

Dated at, etc.

No. 308. Exceptions to master's report on exceptions to answer.

(Title of court and cause.)

Exceptions taken by the complainant to the report of the commissioner of this court, to whom it was referred, to report as to the exceptions filed to the answer of the defendant C D.

First. For that the said commissioner has, in and by his said report, certified that, etc. (*Here set out the words of the report.*) Whereas, the said commissioner ought to have certified that the exceptions to the answer of the defendant C D were well taken, and that the said answer of the defendant C D was imperfect, insufficient and evasive in the particulars excepted to.

Second. For that the said commissioner has certified, etc., (*and so on.*)

In all which particulars the report of the said commissioner is erroneous, and the complainant appeals therefrom to the judgment of this honorable court.

_____,
Sol. for Complainant.

No. 309. Agreement to submit the cause on written arguments.

(Title of court and cause.)

It is stipulated and agreed that this cause be submitted to the court on written arguments. The complainant's counsel to serve his argument within — days, and the defendant's counsel to answer the same within — days thereafter, and the complainant's counsel to reply within — days after the defendant's argument shall have been served.

Dated, etc.

_____,
Sol. for Complainant.

_____,
Sol. for Defendant.

No. 310. Exceptions to answer for insufficiency.

STATE OF MICHIGAN.

The Circuit Court for the County of ——. In Chancery.

A B,
Complainant, }
vs. }
C D,
Defendant. }

Exceptions taken by the complainant to the insufficient answer of the defendant, C D, to the complainant's bill of complaint:

First.—For that the defendant, C D, has not, to the best and utmost of his knowledge, remembrance, information and belief, answered and set forth whether, etc. (*Here set out the ground for exception.*)

Second.—For that the defendant has not in manner aforesaid, answered and set forth whether, etc., and so on, set out the ground for each exception as the case may require, using the words of the interrogatory or matter not answered.)

In all which particulars the complainant excepts to the answer of the defendant, C D, as evasive, imperfect and insufficient; and prays that the defendant, C D, may be compelled to put in a full and sufficient answer thereto.

_____,
Sol. for Complainant.

No. 311. Exceptions to answer for scandal and impertinence.

(Title of cause as in last form.)

Exceptions taken by the complainant to the answer of the defendant, C D, to the bill of complaint in this cause, for scandal and impertinence:

First.—For that the said answer is scandalous from and including the word “he,” in the tenth line of the third paragraph, down to and including the word “hindrance,” in the fourth line of the fourth paragraph thereof.

Second.—For that the said answer is impertinent from and including, etc. (as above, and so on.)

In all which particulars the complainant excepts to the said answer of the defendant, C D, as scandalous or impertinent; and insists that the same ought to be expunged from the said answer.

_____,
Sol. for Complainant.

No. 312. Order to expunge scandal and impertinence from answer.

(Caption and title of cause as in No. 310, ante.)

The answer of the defendant, C D, having been reported by the commissioner, to whom the exceptions for scandal and impertinence were referred, to be scandalous in the matter of *first, third* and *fifth* exceptions, and impertinent in the matter of the *second* and *fourth*, and the said report having become absolute (or approved by the court) against the defendant, it is ordered that the clerk of this court do expunge from the said answer such scandalous and impertinent matter, according to said report. And it is further ordered that the said C D pay to the complainant, or his solicitor, the costs of the said exceptions and the proceedings thereon, within _____ days after service of a copy of this order, and of the taxed bill of costs, on him or his solicitor, or that an attachment issue against him.

No. 313. Abstract of pleadings, etc.

(Title of court and cause.)

The bill in this cause was filed on the _____ day of _____, 18—. The answer was filed on the _____ day of _____, 18— and the replication on the _____ day of _____, 18—. The following witnesses were examined on the _____ day of _____ 18—, before the master in chancery, in pursuance of an order of reference,

made on the — day of —, 18—, to wit: E F and G H on the part of the complainant, and J K and L M on the part of the defendant. The following documents were also produced, to wit, etc.:

The object of the bill is to procure a conveyance from the defendant of the real estate described in the bill, and being the, etc. (*Here insert the description.*)

BILL

States that before complainant purchased lot 7, etc., L M owned the improvements, etc.

Lot 9 was leased to L M on, etc., but by an agreement, etc.

On the — day of —, etc., both parties, etc.

Complainant paid, etc.

Usual charge of confederacy, etc.

Answer on oath prayed for.

Prayer for injunction; that defendant may be decreed to execute conveyance; and for general relief.

REPLICATION.

For complainant, E F testifies that, etc.

G H testifies that, etc.

ANSWER.

Admitted. But the defendant, on, etc., purchased of L M all the improvements.

Denies, etc.

Substantially admitted.

Denied.

General traverse, and usual conclusion.

For defendant, J K testifies that, etc.

L M testifies that, etc.

No. 314. *Brief and points on hearing.*

(*Title of court and cause.*)

I.

The complainant has a perfect remedy at law whereby he may avail himself of every ground of complaint set forth in the bill.

Authorities cited.

II.

The court of chancery will not assume jurisdiction in this case upon the ground of its being a bill of peace. Because,

First. The bill is filed only against a single party, which party has neither commenced nor threatened to commence multiplicity of suits, etc.

Second. The apprehensions of the complainant that, etc.

Third. That, etc.

Authorities cited.

III.

The defendants are authorized by the act of, etc., to pass the ordinance in question.

Authorities cited.

IV.

The ordinance is a reasonable regulation of trade, etc.

Authorities cited.

No. 315. Notice of motion on cross-bill, to stay proceedings in original suit.

STATE OF MICHIGAN.

The Circuit Court for the County of ———. In Chancery.

A B,	Complainant,	}	Original Bill.
vs.			
C C,	Defendant.	}	
C D,	Complainant,	}	Cross-bill.
vs.			
A B,	Defendant.	}	

To T R S, Esq.,

Solicitor for A B.

You will please take notice that I intend to move this honorable court, on the — day of —, A. D. 18—, at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order that the proceedings in the original suit commenced by the above A B, be stayed until the said A B shall have put in his answer to the cross-bill filed against him by C D, and for such other order or relief as the court may think proper to grant; which motion will be found on the said cross-bill, and the (*affidavits and*) certificate of counsel thereto annexed.

Dated, etc.

V H L, Sol. for C D.

No. 316. Certificate of counsel when stay of proceedings is desired on filing cross-bill.

STATE OF MICHIGAN, }
County of ——— } ss.

I hereby certify that I have perused the above and foregoing cross-bill and the original bill filed by the complainant A B, against the said C D as defendant in the above cause, and am of the opinion that the foregoing bill is not intended for delay, and that a stay of proceedings in the original suit is necessary for the attainment of justice between said parties.

Dated, etc.

A M S,

Counselor-at-law and in Chancery.

No. 317. Order staying proceedings in original suit.

(*Title of court and cause as in No. 315.*)

At a session of said court held at the court house, in the city of —, on the — day of —, A. D. 18—.

Present, Hon. A J M,

Circuit Judge.

On reading and filing the cross-bill of C D to the bill of complaint of A B, and the affidavits thereto annexed, and on motion of V H L, solicitor

for the said C D, and upon hearing T R S, solicitor for the said A B, in opposition thereto, it is ordered that all further proceedings in the original suit commenced by the said A B against the said C D, be stayed until the said A B shall have put in his answers to the cross-bill filed against him by said C D.

No. 318. Amendment to a decree.

(Venue and title of cause as in No. 310, ante, page 791.)

And now comes the complainant, by O K, his solicitor; and this cause coming on to be heard upon the motion of the complainant to amend the decree in this cause, rendered on, etc., and the court having looked into the record in said cause, and heard the allegations, proofs and arguments of counsel of said parties, respectively, and being fully advised in the premises:

Doth order, *adjudge* and *decree*, that the decrees so rendered on, etc., be and the same is hereby amended to read as follows, to wit: *(Here insert the decree as amended.)*

No. 319. Amendment to answer.

(Venue and title of cause as in No. 310, ante, page 791.)

Amendment to the answer of the defendant, C D, to his original answer heretofore filed in said entitled cause, made pursuant to an order of court, entered on the — day of —, A. D. 18—.

First. In the — line of the — folio of said answer, after the words —, insert the following: *(Here insert the words to be added.)*

Second. Strike out the — paragraph on the — folio of said answer, beginning with the word —, and ending with the word —, and insert in lieu thereof the following: *(Insert.)*

Third. Add the name of "E F, of," etc., as defendant, in the — line of the — folio of said answer, after the word —. *(Here insert the name of new defendant.)*

— —, Solicitor for Defendant.

No. 320. Amendment to a plea to a bill.

(Venue and title of cause as in No. 310, ante, page 791.)

Amendment to the *first* plea of the defendant, C D, filed in said entitled cause, made in pursuance of the order of court, entered on the — day of —, A. D. 18—.

First. In the — line of the — folio of said plea, after the words — insert the following: *(Here insert the amendment.)*

Second. Strike out, etc. *(Here insert.)*

— —, Solicitor for Defendant.

No. 321. Notice to produce books, etc., at the hearing.

(Venue and title of cause as in No. 310, ante, page 791.)

To P Q, Esq.

Solicitor for defendant.

You are hereby notified to produce on the hearing of the above entitled cause, (or before the circuit court commissioner to whom said cause stands

referred, etc.) the following described books of account, paper, etc. (*Here describe such book and papers particularly so as to apprise the defendant of what is required.*) Otherwise the complainant will ask a peremptory order for their production.

Dated, etc.

E. F, Solicitor for Complainant.

No. 322. Order to take proofs.

STATE OF MICHIGAN.

The Circuit Court for the County of _____. In Chancery.

A B,	}
Complainant,	
vs.	
C D,	
Defendant.	}

This cause being at issue by filing replication to the answer of the above named defendant, and more than ten days having elapsed since the filing of said replication, and no notice of an application for taking the examination of witnesses in open court having been given by either party, on motion of E F, solicitor for said complainant in the above entitled cause, ordered that the parties therein produce their witnesses and take their testimony in said cause within sixty days after notice of this order.

Solicitor for Complainant.

No. 323. Notice of order to take proofs.

(*Title of court and cause.*)

To G H,

Solicitor for Defendant.

Sir: You will please to take notice that the foregoing is true copy of an order to produce proofs this day entered in the above entitled cause.

Dated, etc.

E F,
Solicitor for Complainant.

No. 324. Affidavit for order to close proofs.

(*Title of court and cause.*)

_____ County, ss.

G H being duly sworn, deposes and says that he is the solicitor for the above named defendant; that upon the ____ day of ____, A. D. 18—, E F, the solicitor for said complainant, served upon deponent a notice of an order to take the proofs in said cause within sixty days from the service of said notice. Deponent further says that more than sixty days have elapsed since he received said notice, as aforesaid, and further deponent says not.

G H.

Subscribed, etc.

No. 325. Order closing proofs.

(*Title of court and cause.*)

This cause being at issue and an order having been duly entered and served to take proofs in the same within sixty days from the date thereof,

and proofs having been taken in pursuance of said order, and more than sixty days having elapsed since the entry of said order and the service of a notice of said order, on motion of G H, solicitor for defendant, it is ordered that the proofs in said cause be, and the same are hereby closed,

G H,
Solicitor for Defendant.

No. 326. *Petition by judgment creditor to be made a party to a creditor's bill.*

(*Venue, title of cause and address as in No 226, ante, page 549.*)

The petition of E F, of, etc., respectfully represents that he is a creditor by judgment of the defendant C D in the above entitled cause; that his said judgment was recovered in the — court of the county of —, in the State of —, against the defendant C D for the sum of — dollars, and costs of suit, on, etc., and is wholly unsatisfied and unpaid; that on, etc., an execution in the usual form, was duly issued on said judgment, directed to the sheriff of — county, where the defendant C D then resided, and now resides, to be executed in due form of law; that the said execution was delivered to the said sheriff on the day it bears date; that on, etc., the said sheriff made a return of said execution with an indorsement thereon, that, etc. (*Here insert the return.*)

The petitioner further represents that there is now due and unpaid upon the said judgment the sum of — dollars, with interest thereon from the date of the rendition thereof; that the above entitled cause was commenced on, etc., in favor of said complainant, and all other persons, being judgment creditors, similarly situated, who should come in and contribute to the expenses thereof against the defendant C D for (*State substance of the ground for relief.*) And such proceedings have been had in said cause, that by an interlocutory order in said cause, a receiver has been appointed of the property and effects of the defendant C D, and said receiver has become duly qualified to act by filing the requisite bond as such, and is now in the possession of the property and assets of the said C D.

The petitioner further shows that he is desirous of being made a party to said entitled cause, and to aid in prosecuting the same to its final termination, by collecting in and distributing the assets of said C D *pro rata* among all the creditors; and is willing, and hereby offers, upon being allowed to come in as such party, to contribute his proportion to the expenses of said proceeding.

Wherefore, the petitioner prays that by an order of this court he may be allowed to come in and be made a party complainant in said entitled cause with the said complainant A B upon payment to him of the petitioner's ratable share of the costs and expenses of said suit, in proportion to the amount of his said judgment, to be settled by the clerk, or otherwise ascertained and allowed by the court, and for such other or further relief as to the court shall seem proper.

(*Add affidavit.*)

G H,
Solicitor for Petitioner.

No. 327. Order making a judgment creditor a party to a creditor's bill.

(Caption and title of cause as in No. 322, page 796.)

And now comes E F and presents his petition, duly verified, praying for leave to come in as a party complainant, on contributing to the expense of this cause; and the petitioner having served a notice of the application for such leave, with a copy of his said petition upon said complainant, A B, and the court having heard said petition read, on motion of G H, of counsel for the petitioner, and after hearing J K, of counsel for the complainant, it is *ordered*, that the said E F be allowed to come in, and that he be, and hereby is, made a party complainant in this cause, on paying to the complainant A B, the sum of — dollars, being his ratable proportion of the costs and expenses herein incurred by the said A B.

CHAPTER LIV.

RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES, REVISED AND CORRECTED AT DECEMBER TERM, 1870.

- Section
1. PRELIMINARY REGULATIONS.
 2. PROCESS
 3. SERVICE OF PROCESS.
 4. APPEARANCE.
 5. BILLS TAKEN PRO CONFESSO.
 6. FRAME OF BILLS.
 7. SCANDAL AND IMPERTINENCE IN BILLS.
 8. AMENDMENT OF BILLS.
 9. DEMURRERS AND PLEAS.
 10. ANSWERS.
 11. PARTIES TO BILLS.
 12. NOMINAL PARTIES TO BILLS.
 13. BILLS OF REVIVOR AND SUPPLEMENTAL BILLS.
 14. ANSWERS.
 15. AMENDMENT TO ANSWERS.
 16. EXCEPTIONS TO ANSWERS.
 17. REPLICATION AND ISSUE.
 18. TESTIMONY, HOW TAKEN.
 19. TESTIMONY DE BENE ESSE.
 20. FORM OF THE LAST INTERROGATORY.
 21. CROSS-BILL.
 22. REFERENCE TO AND PROCEEDINGS BEFORE MASTERS.
 23. EXCEPTIONS TO REPORT OF MASTER.
 24. DECREES.
 25. GUARDIANS AND PROCHIEIN AMIS.

SECTION I.

PRELIMINARY REGULATIONS.

1. The Circuit Courts, as courts of equity, shall be deemed always open for the purpose of filing bills, answers, and other pleadings, for issuing and returning mesne and final process and commissions, and for making and directing all interlocutory motions, orders, rules and other proceedings, preparatory to the hearing of all causes upon their merits.

2. The clerk's office shall be open, and the clerk shall be in attendance therein, on the first Monday of every month, for the purpose of receiving, entering, entertaining and disposing of all motions, rules, orders and other proceedings, which are grantable of course, and applied for, or had by the parties, or their solicitors, in all causes pending in equity, in pursuance of the rules hereby prescribed.

3. Any judge of the Circuit Court, as well in vacation as in term, may, at chambers, or on the rule days at the clerk's office, make and direct all such interlocutory orders, rules and other proceedings, preparatory to the hearing of all causes upon their merits, in the same manner and with the same effect as the Circuit Court could make and direct the same in term, reasonable notice of the application therefor being first given to the adverse party, or his solicitor, to appear and show cause to the contrary at the next rule day thereafter, unless some other time is assigned by the judge for the hearing.

4. All motions, rules, orders and other proceedings made and directed at chambers, or on rule days at the clerk's office, whether special or of course, shall be entered by the clerk in an order book, to be kept at the clerk's office, on the days when they are made and directed; which book shall be open at all office hours to the free inspection of the parties in any suit in equity, and their solicitors. And, except in cases where personal or other notice is specially required or directed, such entry in the order book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices and other proceedings entered in such order book, touching any and all the matters in the suits to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice to the parties for whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required. Where the solicitors for all the parties in a suit reside in or near the same town or city, the judges of the Circuit Court may, by rule, abridge the time for notice of rules, orders or other proceedings not requiring personal service on the parties, in their discretion.

5. All motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and exe-

cute decrees; for filing bills, answers, pleas, demurrers and other pleadings; for making amendments to bills and answers; for taking bills *pro confesso*; for filing exceptions, and for other proceedings in the clerk's office which do not, by the rules hereinafter prescribed, require any allowance or order of the court, or of any judge thereof, shall be deemed motions and applications, grantable of course by the clerk of the court. But the same may be suspended, or altered, or rescinded by any judge of the court, upon special cause shown.

6. All motions for rules or orders and other proceedings, which are not grantable of course, or without notice, shall, unless a different time be assigned by a judge of the court, be made on a rule day, and entered in the order book, and shall be heard at the rule day next after that on which the motion is made. And if the adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the court *ex parte*, and granted as if not objected to, or refused, in his discretion.

SECTION II.

PROCESS.

7. The process of *subpœna* shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill; and, unless otherwise provided in these rules, or specially ordered by the Circuit Court, a writ of attachment, and, if the defendant can not be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

8. Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the Circuit Court in suits at common law in actions of *assumpsit*. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within

which the act shall be done, of which the defendant shall be bound without further service to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or of a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party can not be found, a writ of sequestration shall issue against his estate upon the return of *non est inventus*, to compel obedience to the decree.

9. When any decree or order is for the delivery of possession upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

10. Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and every person, not being a party in any cause against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such order as if he were a party in the cause.

SECTION III.

SERVICE OF PROCESS.

11. No process of *subpœna* shall issue from the clerk's office in any suit in equity until the bill is filed in the office.

12. Whenever a bill is filed, the clerk shall issue the process of *subpœna* thereon, as of course, upon the application of the plaintiff, which shall be returnable into the clerk's office the next rule day, or the next rule day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof. At the bottom of the *subpœna* shall be placed a memorandum, that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable; otherwise the bill may be taken

pro confesso. Where there are more than one defendant, a writ of *subpœna* may, at the election of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife defendants, or a joint *subpœna* against all the defendants.

13. The service of all *subpœnas* shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or, in case of husband and wife, to the husband personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some free white person who is a member or resident in the family.

14. Whenever any *subpœna* shall be returned not executed as to any defendant, the plaintiff shall be entitled to another *subpœna*, *toties quoties*, against such defendant, if he shall require it, until due service is made.

15. The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof.

16. Upon the return of the *subpœna* as served and executed upon any defendant, the clerk shall enter his suit upon his docket as pending in the court and shall state the time of the entry.

SECTION IV.

APPEARANCE.

17. The appearance day of the defendant shall be the rule day to which the *subpœna* is made returnable, provided he has been served with the process twenty days before that day; otherwise his appearance day shall be the next rule day succeeding the rule day when the process is returnable.

The appearance of the defendant, either personally or by his solicitor, shall be entered in the order book on the day thereof by the clerk.

SECTION V.

BILLS TAKEN PRO CONFESSO.

18. It shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a judge of

the court, upon motion for that purpose, to file his plea, demurrer or answer to the bill, in the clerk's office, on the rule day next succeeding that of entering his appearance. In default thereof, the plaintiff may, at his election, enter an order (as of course) in the order book, that the bill be taken *pro confesso*, and thereupon the cause shall be proceeded in *ex parte* and the matter of the bill may be decreed by the court at the next ensuing term thereof accordingly, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant, to compel an answer; and the defendant shall not, when arrested upon such process, be discharged therefrom unless upon filing his answer, or otherwise complying with such order as the court or a judge thereof may direct, as to pleading to or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause.

19. When the bill is taken *pro confesso*, the court may proceed to a decree at the next ensuing term thereof, and such decree rendered shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit of the defendant. And no such motion shall be granted, unless the payment of the costs of the plaintiff in the suit up to that time, or part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.

SECTION VI.

FRAME OF BILLS.

20. Every bill, in the introductory part thereof, shall contain the names, places of abode and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows:

“To the judges of the Circuit Court of the United States for the district of —: A B, of —, and a citizen of the State of —, brings this his bill

against C D, of —, and a citizen of the State of —, and E F, of —, and a citizen of the State of —. And thereupon your orator complains and says that," etc.

21. The plaintiff, in his bill, shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff; also what is commonly called the charging part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defense to the bill; also what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the defendant is without any remedy at law; and the bill shall not be demurable therefor. And the plaintiff may, in the narrative or stating part of his bill, state and avoid, by counter-averments, at his option, any matter or thing which he supposes will be insisted upon by the defendant, by way of defense or excuse, to the case made by the plaintiff for relief. The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief; and if an injunction, or a writ of *ne exeat regno*, or any other special order pending the suit is required, it shall also be specially asked for.

22. If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they can not be joined without ousting the jurisdiction of the court as to the other parties. And as to persons who are without the jurisdiction and may properly be made parties, the bill may pray that process may issue to make them parties to the bill, if they should come within the jurisdiction.

23. The prayer for process of *subpœna* in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the court may take order thereon as justice may require, upon the return of the process. If an injunction, or a writ of *ne exeat regno*, or any other special order pending the

suit, is asked for in the prayer for relief, that shall be sufficient without repeating the same in the prayer for process.

24. Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part, that upon the instructions given to him, and the case laid before him, there is good ground for the suit, in the manner in which it is framed.

25. In order to prevent unnecessary costs and expenses, and to promote brevity, succinctness, and directness in the allegations of bills and answers, the regular taxable costs for every bill and answer shall in no case exceed the sum which is allowed in the state court of chancery in the district, if any there be; but if there be none, then it shall not exceed the sum of three dollars for every bill or answer.

SECTION VII.

SCANDAL AND IMPERTINENCE IN BILLS.

26. Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments, *in hæc verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may on exceptions be referred to a master by any judge of the court for impertinence or scandal; and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court or a judge thereof, shall otherwise order. If the master shall report that the bill is not scandalous or impertinent, the plaintiff shall be entitled to all costs occasioned by the reference.

27. No order shall be made by any judge for referring any bill, answer or pleading, or other matter, or proceeding depending, before the court for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule day after the process on the bill shall be returnable, or after the answer or pleading is filed. And such

order, when obtained, shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, procure the master to examine and report for the same on or before the next succeeding rule day, or the master shall certify that further time is necessary for him to complete the examination.

SECTION VIII.

AMENDMENT OF BILLS.

28. The plaintiff shall be at liberty, as a matter of course, and without payment of costs, to amend his bill in any matters whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterward, such as filling blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. But if he amend, in a material point (as he may do of course), after a copy has been so taken, any answer or plea, or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall, without delay, furnish him a fair copy thereof, free of expense, with suitable references to the places where the same are to be inserted. And if the amendments are numerous, he shall furnish in like manner to the defendant, a copy of the whole bill as amended; and if there be more than one defendant, a copy shall be furnished to each defendant affected thereby.

29. After an answer or plea or demurrer is put in, and before replication, the plaintiff may, upon motion or petition, without notice, obtain an order from any judge of the court to amend his bill on or before the next succeeding rule day, upon payment of costs or without payment of costs, as the court or a judge thereof may, in his discretion direct. But after replication filed, the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause.

30. If the plaintiff, so obtaining any order to amend his bill after answer, or plea, or demurrer, or after replication, shall not file his amendments or amended bill, as the case may require, in the clerk's office, on or before the next succeeding rule day, he shall be considered to have abandoned the same, and the cause shall proceed as if no application for any amendment had been made.

SECTION IX.

DEMURRERS AND PLEAS.

31. No demurrer or plea shall be allowed to be filed to any bill, unless, upon a certificate of counsel that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant that it is not interposed for delay; and if a plea, that it is true in point of fact.

32. The defendant may, at any time before the bill is taken for confessed, or afterward, with the leave of the court, demur or plead to the whole bill or part of it, and he may demur to part, plead to part, and answer as to the residue; but in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea, and explicitly denying the fraud and combination, and the facts on which the charge is founded.

33. The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him.

34. If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to that period, unless the court shall be satisfied that the defendant has good ground in point of law or fact to interpose the same, and it was not interposed vexatiously or for delay. And upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of

the court, be reasonably done; in default whereof, the bill shall be taken against him *pro confesso*, and the matter thereof proceeded in and decreed accordingly.

35. If, upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it shall deem reasonable.

36. No demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.

37. No demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.

38. If the plaintiff shall not reply to any plea, or set down any plea for demurrer for argument, on the rule day when the same is filed, or on the next day succeeding rule day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for the purpose.

SECTION X.

ANSWERS.

39. The rule that if a defendant submits to answer he shall answer fully to all the matters of the bill, shall no longer apply in cases where he might by plea protect himself from such answer and discovery. And the defendant shall be entitled in all cases by answer to insist upon all matters of defense (not being matters of abatement, or to the character of the parties, or matters of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar, and an answer in support of such plea, touching the matters set forth in the bill, to avoid or repeal the bar or defense. Thus, for example, a *bona fide* purchaser for a valuable consideration, without

notice, may set up that defense by way of answer instead of plea, and shall be entitled to the same protection, and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea.

40. A defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto; and a defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such defendant is required to answer; and where a defendant shall answer any statement or charge in the bill, to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent.

December Term, 1850.

Ordered, That the fortieth rule heretofore adopted and promulgated by this court as one of the rules of practice in suits in equity in the Circuit Courts be, and the same is hereby, repealed and annulled. And it shall not hereafter be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desires to do so, to obtain a discovery.

41. The interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, etc.; and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill, in the form or to the effect following, that is to say: "The defendant (A B) is required to answer the interrogatories numbered respectively 1, 2, 3," etc.; and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill. (See *Amendment*, post, 820.)

42. The note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill, and the addition of any such note to the bill, or any alteration in or addition to

such note after the bill is filed, shall be considered and treated as an amendment of the bill.

43. Instead of the words of the bill now in use, preceding the interrogating part thereof, and beginning with the words "To the end, therefore," there shall hereafter be used words in the form or to the effect following: "To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct and perfect answer make to such of the several interrogatories herein-after numbered and set forth, as by the note hereunder written they are respectively required to answer, that is to say:

"1. Whether, etc.

2. Whether," etc.

44. A defendant shall be at liberty, by answer, to decline answering any interrogatory, or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill from which he might have protected himself by demurrer.

45. No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the court, or a judge thereof, may in his discretion direct.

46. In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer on or before the next succeeding rule day after that on which the amendment or amended bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default the like proceedings may be had as in cases of an omission to put in an answer.

SECTION XI.

PARTIES TO BILLS.

47. In all cases where it shall appear to the court that persons who might otherwise be deemed necessary or proper

parties to the suit, can not be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in their discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

48. Where the parties on either side are very numerous, and can not, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties.

49. In all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate, or the proceeds, or the rents and profits, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit; but the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

50. In suits to execute the trusts of a will it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party where he desires to have the will established against him.

51. In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

52. Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk's order book, in the form or to the effect following (that is to say): "Set down upon the defendant's objection for want of parties." And where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill.

53. If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties not having by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the court (*if it shall think fit*) shall be at liberty to make a decree saving the rights of the absent parties.

SECTION XII.

NOMINAL PARTIES TO BILLS.

54. Where no account, payment, conveyance or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the *subpœna* upon him, need not appear and answer the bill, unless the plaintiff specially requires him so to do by the prayer of his bill; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer, he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.

55. Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance and plead, demur or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled,

as of course, upon motion without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the court in time, or by a judge thereof in vacation, after a hearing, which may be *ex parte*, if the adverse party does not appear at the time and place ordered. In every case where an injunction, either the common injunction or a special injunction, is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court.

SECTION XIII.

BILLS OF REVIVOR AND SUPPLEMENTAL BILLS.

56. Whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor, or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same; which bill may be filed in the clerk's office at any time; and upon suggestion of the facts, the proper process of *subpœna* shall, as of course, be issued by the clerk, requiring the proper representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule day which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived, as of course.

57. Whenever any suit in equity shall become defective from any event happening after the filing of the bill (as, for example, by change of interest in the parties), or for any other reason a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule day, upon proper cause shown, and due notice to the other party. And if leave is granted to file such supplemental bill the defendant shall demur, plead or answer thereto, on the next succeeding rule day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the court.

58. It shall not be necessary in any bill of revivor, or supplemental bill, to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

SECTION XIV.

ANSWER.

59. Every defendant may swear to his answer before any justice or judge of any court of the United States, or before any commissioner appointed by any circuit court to take testimony or depositions, or before any master in chancery appointed by any circuit court or before any judge of any court of a State or Territory.

SECTION XV.

AMENDMENT OF ANSWERS.

60. After an answer is put in, it may be amended as of course, in any matter of form, or by filling up a blank or correcting a date, or reference to a document or other small matter, and be resworn at any time before a replication is put in or the cause is set down for a hearing upon bill and answer. But after replication, or such setting down for a hearing, it shall not be amended in any material matters, as by adding new facts or defenses, or qualifying or altering the original statements, except by special leave of the court or of a judge thereof, upon motion and cause shown after due notice to the adverse party, supported, if required, by affidavit. And in every case where leave is so granted the court or the judge granting the same may, in his discretion, require that the same be separately engrossed and added as a distinct amendment to the original answer, so as to be distinguishable therefrom.

SECTION XVI.

EXCEPTIONS TO ANSWERS.

61. After an answer is filed on any rule day, the plaintiff shall be allowed until the next succeeding rule day to file in

the clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the court or a judge thereof; and if no exceptions shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient.

62. When the same solicitor is employed for two or more defendants, and separate answers shall be filed, or other proceedings had by two or more of the defendants separately, costs shall not be allowed for such separate answers or other proceedings, unless a master, upon reference to him, shall certify that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together.

63. Where exceptions shall be filed to the answer for insufficiency within the period prescribed by these rules, if the defendant shall not submit the same and file an amended answer on the next succeeding rule day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule day thereafter before a judge of the court, and shall enter as of course, in the order book, an order for that purpose. And if he shall not so set down the same for a hearing, the exceptions shall be deemed abandoned, and the answer shall be deemed sufficient; provided, however, that the court or any judge thereof, may, for good cause shown, enlarge the time for filing exceptions, or for answering the same, in his discretion, upon such terms as he may deem reasonable.

64. If at the hearing the exceptions shall be allowed, the defendant shall be allowed to put in a full and complete answer thereto on the next succeeding rule day; otherwise the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions; and the defendant, when he is in custody upon such writ, shall not be discharged therefrom but by an order of the court, or of a judge thereof, upon his putting in such answer and complying with such other terms as the court or judge may direct.

65. If upon argument, the plaintiff's exceptions to the answer shall be overruled, or the answer shall be adjudged

insufficient, the prevailing party shall be entitled to all the costs occasioned thereby, unless otherwise directed by the court, or the judge thereof, at the hearing upon the exceptions.

SECTION XVII.

REPLICATION AND ISSUE.

66. Whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule day thereafter; and in all cases where the general replication is filed the cause shall be deemed to all intents and purposes at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order as of course for a dismissal of the suit; and the suit shall thereupon stand dismissed, unless the court, or a judge thereof, shall, upon motion for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting to speed the cause, and to such other terms as may be directed.

SECTION XVIII.

TESTIMONY, HOW TAKEN.

67. After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time, the commission may issue *ex parte*. In all cases the commissioner or commissioners shall be named by the court, or by a judge thereof. If the parties shall so agree, the testimony may be taken upon oral interrogatories by the parties or their agents, without filing any written interrogatories.

December Term, 1854.

Ordered, That the sixty-seventh rule governing equity practice be so amended as to allow the presiding judge of any court exercising jurisdiction, either in term time or vacation, to vest in the clerk of said court general power to name commissioners to take testimony in like manner that the court or judge thereof can now do by the said sixty-seventh rule.

December Term, 1861.

Ordered, That the last paragraph in the sixty-seventh rule in equity be repealed, and the rule be amended as follows: Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court, the examiner to be furnished with a copy of the bill and answer, if any; and such examination shall take place in the presence of the parties or their agents, by their counsel or solicitors, and the witnesses shall be subject to cross-examination and re-examination, and which shall be conducted as near as may be in the mode now used in common law courts. The depositions taken in such oral examination shall be taken down in writing by the examiner in the form of narrative, unless he determines the examination shall be by question and answer in special instances; and when completed shall be read over to the witness and signed by him in the presence of the parties or counsel, or such of them as may attend; provided, if the witness shall refuse to sign the said deposition, then the examiner shall sign the same; and the examiner may, upon all examinations, state any special matters to the court as he shall think fit; and any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality or relevancy of the questions; and the court shall have power to deal with the costs of incompetent, immaterial or irrelevant depositions, or parts of them, as may be just.

The Compulsory Attendance of Witnesses.

In case of refusal of witnesses to attend, to be sworn, or to answer any question put by the examiner, or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

Notice shall be given by the respective counsel or solicitors, to the opposite counsel or solicitors or parties, of the time and place of the examination, for such reasonable time as the examiner may fix by order in each cause.

When the examination of witnesses before the examiner is concluded, the original deposition, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court, to be there filed of record in the same mode as prescribed in the thirtieth section of act of Congress September 24, 1789.

Testimony may be taken on commission in the usual way by written interrogatories and cross-interrogatories, on motion to the court in term time, or to a judge in vacation, for special reasons satisfactory to the court or judge.

December Term, 1869.

Amendment to 67th rule.—Where the evidence to be adduced in a cause is to be taken orally, as provided in the order passed at the December term, 1861, amending the 67th general rule, the court may, on motion of either party, assign a time within which the complainant shall take his evidence in support of the bill, and a time thereafter within which the defendant shall take his evidence in defense, and a time thereafter within which the complainant shall take his evidence in reply; and no further evidence shall be taken in the cause unless by agreement of the parties, or by leave of court first obtained on motion for cause shown.

68. Testimony may also be taken in the cause after it is at issue by deposition, according to the acts of Congress. But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witness, either under a commission or by a new deposition

taken under the acts of Congress, if a court or a judge thereof shall, under all the circumstances, deem it reasonable.

69. Three months and no more shall be allowed for the taking of testimony after the cause is at issue, unless the court or a judge thereof shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing. Immediately upon the return of the commissions and depositions containing the testimony into the clerk's office, publication thereof may be ordered in the clerk's office, by any judge of the court, upon due notice to the parties, or it may be enlarged, as he may deem reasonable under all the circumstances; but, by consent of the parties, publication of the testimony may at any time pass in the clerk's office; such consent being in writing, and a copy thereof entered in the order books, or indorsed upon the deposition or testimony.

SECTION XIX.

TESTIMONY DE BENE ESSE.

70. After any bill filed, and before the defendant hath answered the same, upon affidavit made that any of the plaintiff's witnesses are aged and infirm, or going out of the country, or that any one of them is a single witness to a material fact, the clerk of the court shall, as of course, upon the application of the plaintiff, issue a commission to such commissioner or commissioners, as a judge of the court may direct, to take the examination of such witness or witnesses *de bene esse*, upon giving due notice to the adverse party of the time and place of taking his testimony.

SECTION XX.

FORM OF THE LAST INTERROGATORY.

71. The last interrogatory in the written interrogatories to take testimony now commonly in use shall in the future be altered and stated in substance thus: "Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer."

SECTION XXI.

CROSS-BILL.

72. Where a defendant in equity files a cross-bill for discovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto before the original plaintiff shall be compellable to answer the cross-bill. The answer of the original plaintiff to such cross-bill may be read and used by the party filing the cross-bill at the hearing, in the same manner and under the same restrictions as the answer praying relief may now be read and used.

SECTION XXII.

REFERENCE TO AND PROCEEDINGS BEFORE MASTERS.

73. Every decree for an account of the personal estate of a testator or intestate shall contain a direction to the master, to whom it is referred to take the same, to inquire and state to the court what parts, if any, of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct.

74. Whenever any reference of any matter is made to a master to examine and report thereon, the party at whose instance or for whose benefit the reference is made shall cause the same to be presented to the master for a hearing on or before the next rule day succeeding the time when the reference was made; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

75. Upon every such reference it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties, or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte*, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent

party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings, and to make his report, and to certify to the court or judge, the reasons for any delay.

76. In the reports made by the master to the court no part of any state of facts, charge, affidavit, deposition, examination, or answer brought in or used before them shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination, or answer shall be identified, specified, and referred to, so as to inform the court what state of facts, charge, affidavit, deposition, examination or answer were so brought in or used.

77. The master shall regulate all the proceedings in every hearing before him, upon every such reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, *viva voce*, all witnesses produced by the parties before him, and to order the examination of other witnesses to be taken, under a commission to be issued upon his certificate from the clerk's office, or by deposition, according to the acts of Congress, or otherwise, as hereinafter provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

78. Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by *subpoena* in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioner, master or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any

witness shall refuse to appear, or to give evidence, it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the court. But nothing herein contained shall prevent the examination of witnesses *viva voce* when produced in open court, if the court shall, in its discretion, deem it advisable.

79. All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the accounts so brought in shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories in the master's office, or by deposition, as the master shall direct.

80. All affidavits, depositions and documents which have been previously made, read or used in the court, upon any proceeding in any cause or matter, may be used before the master.

81. The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *viva voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examinations shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court, if necessary.

82. The Circuit Courts may appoint standing masters in chancery in their respective districts, both the judges concurring in the appointment; and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master in chancery for his services in any particular case shall be fixed by the Circuit Court in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

SECTION XXIII.

EXCEPTIONS TO REPORT OF MASTER.

83. The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order book. The parties shall have one month from the time of filing the report to file exceptions thereto; and if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule day after the month has expired. If exceptions are filed, they shall stand for hearing before the court, if the court is then in session; or, if not, then at the next sitting of the court which shall be held thereafter by adjournment or otherwise.

84. And in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled shall, for every exception overruled, pay costs to the other party, and for every exception allowed, shall be entitled to costs—the costs to be fixed in each case by the court, by a standing rule of the Circuit Court.

SECTION XXIV.

DECREES.

85. Clerical mistakes in decrees, or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual enrollment thereof, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing.

86. In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: "This cause came on to be heard (or *to be further heard*, as the case may be,) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.: (*Here insert the decree or order.*)

SECTION XXV.

GUARDIANS AND PROCHEIN AMIS.

87. Guardians *ad litem* to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable to sue for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*; subject, however, to such orders as the court may direct for the protection of infants and other persons.

88. Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party, or by some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court in the discretion of the court.

89. The Circuit Courts (both judges concurring therein), may make any other and further rules and regulations for the practice, proceedings and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.

90. In all cases where the rules prescribed by this court or by the Circuit Court do not apply, the practice of the Circuit Court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local convenience of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.

91. Whenever, under these rules, an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof, make solemn affirmation to the truth of the facts stated by him.

December Term, 1863.

92. *Ordered*, That in suits in equity for the foreclosure of mortgages in the Circuit Courts of the United States, or in any court of the territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same as is provided in the 8th rule of this court regulating the equity practice, where the decree is solely for the payment of money.

December Term, 1871.

Amendment to 41st Rule.—If the complainant, in his bill shall waive an answer under oath, or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only; but may nevertheless be used as an affidavit, with the same effect as heretofore, on a motion to grant or dissolve an injunction, or on any other incidental motion in the cause, but this shall not prevent a defendant from becoming a witness in his own behalf under section 3 of the act of Congress of July 2, 1864. (*Ante*, page 810.)

October Term, 1878.

Injunction.—When an appeal from a final decree in equity suits, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal, upon such terms as to bond or otherwise as he may consider proper for the security of the rights of the opposite party.

October Term, 1881.

Bills by stockholders in a corporation, etc.—Every bill brought by one or more stockholders in a corporation, against the corporation and other parties, founded on right which may

properly be asserted by the corporation, must be verified by oath and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since, by operation of law, and that the suit is not a collusive one, to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action.

Equity practice under the act of June 1, 1872—Statutory.—Section 7 of that act provides

“That whenever notice is given of a motion for an injunction, out of the Circuit or District Court of the United States, the court or judge thereof may, if there appear to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion. Such order may be granted with or without security, in the discretion of the court or judge: *Provided*, that no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order, except within the circuit to which he is allotted, and in causes pending in the circuit to which he is allotted, or in such causes at such place outside of the circuit as the parties may in writing stipulate, except in causes where such application can not be heard by the circuit judge of the circuit, or the district judge of the district.”

Section 13 of the same act provides

“That when, in any suit in equity, commenced in any court in the United States to enforce any legal or equitable lien or claim against real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make such an order, directing such absent defendant to appear, plead, answer or demur to the complainant's bill, at a certain day therein to be designated, which order shall be served on such absent defendant, if practicable, wherever found; or where such personal service is not practicable, such order shall be published in such a manner as the court

shall direct; and in case such absent defendant shall not appear plead, answer or demur, within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service of publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit, in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards such absent defendant, without appearance, affect his property within such district only.”¹

¹ Bradley's Rules of Practice in the U. S. Courts of Equity.

GENERAL INDEX.

(See INDEX TO FORMS, *post*, page 871.)

ABATEMENT—*	
Pleas to the jurisdiction of the court.....	82
To the person.....	83
ABSTRACTS—*	
Of title in partition suits.....	435
ACCOUNTING—	
Proceedings before commissioner in.....	145
Before master, U. S. Eq.....	821
ACCOUNT—*	
Between partners.....	309
Kept by register, deposit.....	770
Receiver's to be kept separate.....	408
Decree for, U. S. Eq.....	821
ADDRESS—*	
Of bills and petitions.....	12
In U. S. Court of Eq.....	804
ADULTERY—*	
A ground for divorce.....	472
May be established by circumstantial evidence.....	472
Frame of bill charging, etc.....	474
Defenses to the charge, etc.....	500
AFFIDAVITS—*	
Essentials of, for process of appearance.....	47
Of non-collusion, to bill of interpleader.....	256
Of regularity, in foreclosure proceedings.....	361
In divorce cases.....	467
For publication, etc.....	49
Of merits in foreclosure cases.....	350
General requisites.....	194
<i>Jurat</i>	192
Before whom to be made.....	192
Should state fact positively.....	194
For injunction.....	619
Of genuineness of acceptance of service.....	780
On motions and petitions.....	774
On taxation of costs.....	764

*See same title, **INDEX TO FORMS**, *post*.

AGENTS—

When to verify creditor's bill.....	405
Bills generally.....	30

AGREEMENTS—

Between parties to be in writing.....	780
To be denied in divorce cases.....	467
Oath, and examination in relation to.....	467

ALIMONY—*

<i>Pendente lite</i> , and expenses.....	512
Hearing upon motion for.....	512
How obtained.....	513
Question of guilt will not be considered.....	516
Amount of allowance.....	516
How order for, is enforced.....	517
Proceedings to compel payment.....	518
(See CONTEMPTS.)	

Permanent.....	523
Enforcement of decree for.....	520
Decree for.....	527
Gives no vested right.....	524
May be terminated.....	528
Amendment of.....	528
Conveyance to defraud, when may be set aside.....	528

AMENDMENTS—

To answer.....	117
In U. S. courts of equity.....	815

AMENDMENTS—TO A BILL—*

Nature of.....	125
Without leave of court.....	125
After demurrer.....	125
When to be made.....	127
When not allowed.....	129
After plea, effect of, etc.....	129
Of pleading generally, discretionary.....	127
How made, etc.....	131
Must be sworn to.....	130
To a creditor's bill.....	405
In U. S. equity courts.....	807
Answer to.....	118

ANSWER TO A BILL—*

Nature of, etc.....	100
Mode of answering.....	103
Fraud, how alleged.....	103
Frame of.....	104
Must be paragraphed.....	106
What should contain.....	106
Signing of.....	106
How entitled.....	104

* See same title, INDEX TO FORMS, *post*.

ANSWER TO A BILL—Continued.

Manner of verifying, etc.....	107
May be joined.....	106
Affirmative relief upon, etc.....	104
Waiver of oath, how waived.....	108
Swearing to.....	107
Before whom may be sworn to.....	107
To be put in within fifteen days.....	55, 116
Exceptions to.....	103
Effect of sworn answer as evidence.....	108
Against a co-defendant.....	109
Of deceased ancestor.....	109
Admissions in.....	109
Of a corporation.....	110
Of infants and insane defendants.....	110
Coupled with demurrer.....	76
In support of a plea.....	98
Allowing a plea to stand for.....	98
To an amended bill.....	118
Amendment of.....	117
Affirmative relief upon.....	121
To be perfected before cross-bill, etc.....	278
To a supplemental bill.....	204
To a bill of revivor.....	224
To a bill of review.....	247
To a bill of interpleader.....	259
To a bill to perpetuate testimony.....	270
To a cross-bill.....	281
To a bill to probate a foreign will.....	460
To petition to bar dower of insane wife.....	658
When required to a creditor's bill.....	406
In the nature of cross-bill.....	121
When must be sworn to.....	122
Defense to.....	122
Frame of.....	122
No further process required.....	122
In U. S. courts of equity.....	809
How sworn to.....	815

APPEALS—*

From order of circuit court commissioner.....	150
Bond on.....	150
Proceedings to perfect.....	150
In partition suits.....	449
From probate of foreign will.....	460
In proceedings to dissolve corporations.....	676
From an order of contempt.....	669
From circuit courts in chancery.....	713
Who may appeal.....	713

* See same title, INDEX TO FORMS, *post*.

APPEALS—Continued.	
Jurisdiction of.....	713
When appeal lies.....	714
From final orders and decrees.....	714
Not from orders, not final.....	714
From tax decree.....	717
Claiming appeal.....	717
Appellant's bond.....	717
Notice of.....	718
APPEARANCE—	
When and how entered.....	116
Defendant entitled to notice after.....	54
How compelled, etc.....	52
In U. S. courts of equity.....	803
(See PROCESS FOR APPEARANCE.)	
ARGUMENT—*	
Of a demurrer to a bill.....	78
Notice of, for what day to be given.....	78
Of a plea to a bill.....	96, 751
Party may notice for, etc.....	96
In the Supreme Court.....	736
Limitation of.....	736
Order of.....	736
What time allowed.....	736
Of objections for want of parties, U. S. Eq.....	813
ASSETS—(See MARSHALING ASSETS.)	
ASSIGNMENT OF ERRORS—*	
Filing, and form of.....	728
On charge of court.....	730
Pleading upon.....	728
Pleas in bar.....	731
Release of errors.....	731
Statute of limitations.....	732
Replication to.....	732
Trial of issue of fact upon.....	732
ATTACHMENT—*	
To compel an answer.....	52
To compel further answer to creditor's bill.....	406, 769
Neglect to appear on, penalty for.....	52
Proceedings on, to compel appearance.....	52
For fees of master, U. S. Eq.....	823
(See CONTEMPTS.)	
ATTORNEYS—	
How notices served on.....	190
Agreements between, to be in writing.....	780
AWARD—	
Specific performance of.....	290

* See same title, INDEX TO FORMS, *post*.

BANKS—

Accounts with, how kept by the register.....	770
Orders on, how drawn.....	771

BILLS IN CHANCERY—*

Division of.....	10
Constituent parts of.....	11
The address.....	12
The introduction.....	12
The premises, or stating part.....	13
Certainty required.....	14
Exhibits to.....	19
Must state the whole subject	19
And not too many subjects.....	19
Multifariousness.....	20
Scandal and impertinence.....	23
The confederating part	24
The charging part.....	24
The jurisdictional clause.....	25
The interrogating part.....	25
The prayer for relief.....	26
Must be paragraphed	27
The prayer for process.....	28
Not necessary in Michigan.....	28
Frame of a bill.....	28
Signing of bills.....	29
Swearing to the bill	30
Michigan practice.....	30
Parties to.....	31
Who should be made.....	32
How described.....	23
Persons under disability.....	33
Interest of.....	34
Joinder of.....	34
Want of.....	34
Misjoinder of.....	34
In courts of equity of U. S.....	804
Nominal parties, U. S. Eq.....	813
In suits to execute trust of a will, U. S. Eq.....	812
(See AMENDMENT TO A BILL)	

BONDS—*

To be given as security for costs.....	8
By commissioner of adjoining county.....	137
On appeal from commissioner.....	150
To be filed and returned with appeal papers.....	150
By next friend of infants.....	629
By guardian, on sale of estates of infants, etc.....	635
By receiver in creditor's suit	407
Upon granting an injunction.....	621

* See same title, **INDEX TO FORMS**, *post*.

BONDS—*Continued.*

To be filed with the register in chancery.....	621
By guardian of insane wife.....	659
For appearance in contempt proceedings.....	665
Of defendant in <i>ne exeat</i>	557
On appeal to Supreme Court.....	717
Approval of.....	717
Notice of filing.....	717

BOOKS AND WRITINGS—*

Notice to produce.....	163
Prior to hearing.....	164
Portion may be sealed up.....	164
Documents in the hands of third persons.....	164
Power of Supreme Court to compel discovery of.....	681

CALENDAR DOCKET—

Of circuit court, how made up, etc.....	171
Of Supreme Court, notice, etc.....	737
What are calendar cases.....	737
Call of calendar.....	738
Motion docket.....	735

CAPTION—*

Of orders and decrees.....	179
Of circuit court commissioner.....	179

CERTAINTY—

Bill in chancery must have.....	14
---------------------------------	----

CERTIFICATE—

When plea or answer is sworn to out of State.....	107
Of counsel, to petition for rehearing.....	189
That demurrer is well founded, etc.....	75
That plea is well founded.....	86

CERTIORARI—

Nature of.....	699
Common law writ.....	699
Who may prosecute the writ.....	702
Parties defendants to.....	702
By whom allowed.....	700
When allowed.....	701
Issue, <i>teste</i> and return of.....	700
Notice of issuing, etc.....	700
When return to be made to.....	700
Time for returning, may be extended.....	688
Motion to dismiss for want of prosecution.....	688
How further return to be obtained.....	688
Proceedings to compel parties to join in or sever.....	689
Terms may be imposed on motion to dismiss.....	689
Limitations of.....	701
Questions of law on, only considered.....	702

* See same title, INDEX TO FORMS, *post*.

. CHILDREN—

Name and age to be set forth in bill for divorce.....	466
Custody of, in divorce suits.....	507
Legitimacy of, in divorce suits.....	506
Custody and support of, in suits for maintenance.....	541

CIRCUIT COURT COMMISSIONERS—*

Powers of.....	135
To act as master.....	145
Must keep register.....	136
When another commissioner may act.....	137
Proceedings before.....	137
Testimony taken by.....	137
Time in which to be taken.....	137
Fees, by whom paid.....	138
Failure of complainant to take testimony.....	138
Time for returning testimony.....	138
Notice of cause for hearing.....	138
Subpoenas may issue.....	138
Manner of taking testimony.....	138
Notice of examination of witnesses.....	139
Extension of time for taking testimony.....	140
Proceedings upon taking of testimony.....	140
Testimony must be signed by witness.....	143
Opening case for further proof on hearing.....	145
Accounting before commissioner.....	145
Report of and proceedings thereon.....	146
Confirmation of report.....	147
Exceptions to report.....	147, 149
Objections to report.....	148
Appeal from order of.....	150
Caption of order made by.....	179
Proceedings before, in suits to dissolve corporations.....	649
Duties of, on reference of accounts of corporations.....	655
Of foreclosure bills.....	360
Reports of mortgage sale.....	373
In partition suits.....	435
In divorce suits.....	497
In suits for separate maintenance.....	535
To make allowance of alimony.....	535
In proceedings to bar dower of insane.....	658
Upon petition to bar dower of insane.....	658
May make separate reports.....	760

CLASSES—

Of causes on calendar.....	171
Notice of hearing, to specify.....	172

CLERK—

To indorse time of filing papers.....	780
Not to suffer papers to be taken from office.....	780

* See same title, INDEX TO FORMS, *post*.

CLERK—*Continued.*

To keep special motion book.....	183
Notice to put cause on calendar, to be served on.....	171
How to make up calendar.....	171
To be made up by.....	171
Of Supreme Court.....	687

CLOUD UPON TITLE—(See TITLE, BILL TO QUIET.)

COLLUSION—

A bar for divorce.....	467
Affidavit of non-collusion, to a bill for divorce, etc.....	467
Affidavit of non-collusion to bill of interpleader.....	256
Allegation of non-collusion in creditor's bill.....	404

COMMENCEMENT OF A SUIT IN CHANCERY—

By bill.....	5
By information.....	5
Where commenced.....	6
Amount involved.....	7
Security for costs upon, when required.....	8
Bill to be filed before subpoena issue, U. S. Eq.....	802

COMMISSION—*

To take deposition of non-resident witnesses.....	157
Adverse party may join in.....	157
To take testimony, probate foreign wills.....	459

COMMISSIONERS—

To make partition of real estate.....	436
How appointed, etc.....	436
Oath to be taken by.....	436
Report of.....	437
Fees of.....	437
Report may be set aside.....	438
Confirmation of.....	438

COMMISSIONERS, CIRCUIT COURT—(See CIRCUIT COURT COMMISSIONERS.)

CONDONATION—

Effect of, in divorce suits.....	500
----------------------------------	-----

CONSENT—

Order by.....	181
To be negatived, in bill for divorce.....	467
Of all parties to discharge of receiver.....	407

CONTEMPTS—*

Nature of.....	662
Violation of injunction.....	664
Proceedings by attachment.....	665
Personal service required to bring party into.....	665
Proceedings by order to show cause, etc.....	666
Punishment and discharge.....	667
Order of conviction.....	668

* See same title, INDEX TO FORMS, *post*.

CONTEMPTS—Continued.

Process of commitment.....	668
Sequestration.....	669
Effect of contempt.....	669
Appeal.....	669
Admissions of solicitor for defendant.....	670
Interrogatories, answers, evidence in.....	671
Witnesses refusing to appear, etc., U. S. Eq.....	818

CONTINUANCE—

Of hearing of motions, etc.....	187
Notice of motion for.....	188
If printed record is not furnished.....	733

CONTRACTS—*

Specific performance of.....	284
Parol.....	291
Bill to set aside, as a cloud on title.....	552

CONTRIBUTION—

When will lie.....	673
Nature of.....	673
Jurisdiction.....	673
As between sureties.....	674
Between wrongdoers.....	675
Joint tenants.....	675
Co-obligors.....	676
Partners.....	676
Legatees and devisees.....	676
Stockholders.....	677
For expense of party wall.....	677
Parties to bill for.....	673

CORPORATIONS—

Proceedings against.....	639
By a single shareholder.....	639
By attorney-general.....	640
Jurisdiction of courts over the officers of.....	641
Injunctions, when allowed.....	642
Sequestration of property of.....	643
Surrender of corporate rights.....	643
Insolvent, proceedings against.....	644
Injunctions, who may apply for.....	644
Receiver, appointment of.....	644
Making stockholders parties.....	645
Making directors parties.....	645
Bill against stockholders.....	645
Discovery, by corporation.....	646
By officers.....	647
Staying proceedings against, at law.....	647
Voluntary dissolution of.....	648
Who may apply for.....	648

* See same title, INDEX TO FORMS, *post*.

CORPORATIONS—*Continued.*

Contents of application for.....	648
Affidavit to.....	649
Order to show cause.....	649
Publication of notice.....	649
Proceedings before commissioners.....	649
When to be dissolved.....	650
Receivers upon.....	650
To give notice of their appointment.....	650
To bring suit.....	651
Certain sales void.....	651
Debtor to account to.....	651
Power to settle controversies.....	651
To call meetings.....	652
To cancel subsisting contracts.....	652
Commissions of.....	652
To retain certain moneys.....	652
Order of payment of debts.....	653
Second dividends.....	653
Proceedings upon.....	653
Debts not exhibited.....	654
Distribution to stockholders.....	654
Receiver under control of courts.....	654
Receiver's accounts.....	654
Duty of commissioners on reference.....	655
Suits not to abate.....	655
Discontinued.....	656
Appeal.....	656
Certain, excepted.....	656
Answer of, to a bill in chancery.....	110

COSTS—

When security for required, etc.....	8
Motion for.....	8
New bond may be required upon motion.....	8
On continuance.....	188, 775
On bills of interpleader.....	263
Of taking testimony before commissioner.....	138
In partition suits.....	437, 448
In divorce suits.....	509, 764
In proceedings by infants, etc.....	630
In contempt proceedings, etc.....	668
On amendment of bill, etc.....	78, 125
Deposit for, on rehearing.....	189
Solicitor's fees taxable.....	763
Taxation of—Re-taxation, etc.....	764
In the Supreme Court.....	742
Taxation of.....	744
Re-taxation of.....	745

CREDITOR'S BILL—*

When may be filed.....	390
When proper.....	392
On justice's judgment.....	392
In United States Court.....	392
In aid of execution.....	393
To reach equitable assets.....	395
Trust funds.....	396
What may be reached by.....	397
Parties to.....	399
Complainants.....	399
Defendants.....	400
Priority and lien of.....	401
Frame of bill.....	403
In aid of execution.....	404
What should state.....	404
Prayer of.....	405
Verification of.....	405
Amendments of.....	405
Proceedings upon.....	406
Defendant required to answer.....	406
Receivers in.....	406
Their powers.....	406
For several suits.....	407
Security by.....	407
How to pay over moneys.....	407
For subsequent suits.....	407
Accounts of.....	408
May be appointed in vacation.....	408

CRIME—*

Conviction of, ground for divorce.....	478
--	-----

CROSS-BILLS—*

Nature of.....	271
Frame of.....	274
When to be filed.....	278
Leave to.....	279
Process upon.....	279
Defenses to.....	280
Demurrer.....	280
Pleas.....	280
Answer.....	280
When to be answered.....	281
Affirmative relief on answer to original bill.....	274
Dismissal of.....	282
Proceedings upon.....	282
Must conform to original bill.....	283
Answer in the nature of.....	121
In U. S. courts of equity.....	821

* See same title, INDEX TO FORMS, *post*.

CRUELTY—*

Extreme, a ground for divorce.....	485
What is.....	485

DECREES AND ORDERS—*

Nature, uses and kinds of.....	175
Interlocutory.....	176
Final.....	177
Frame of.....	178
Constituent parts.....	178
Caption and title.....	179
The recitals.....	179
Ordering part.....	180
Declaratory part.....	181
By consent.....	181
<i>Nunc pro tunc</i> clause.....	181
Drawing of.....	182
Common and special orders.....	182
Entitling in supplemental bills, etc.....	206
In revivor suits.....	219
In bills of interpleader.....	261
For specific performance.....	302
On bills to redeem.....	335
In foreclosure suits.....	365
Strict foreclosure.....	386
For deficiency, on foreclosure.....	381
In creditor's suits.....	419
In partition suits.....	447
On bills relating to partnerships.....	316
On bills to probate foreign will.....	460
On bills for divorce.....	505
Alimony.....	523
On bills for separate maintenance.....	534
In suits for maintenance.....	541
In suits to quiet title.....	554
Of course, dismissed for not serving copy of bill.....	55
<i>Pro confesso</i> , after overruling plea or demurrer.....	752
Enrollment of decree.....	184
Must be, before execution, etc., upon.....	184
By default, may be set aside.....	60
<i>Allegata</i> and <i>probata</i> must agree to justify.....	175
For divorce, not granted by default without proof.....	504
Commissioner can not vacate.....	135
Made by consent, how entered.....	181
Are binding, and can not be disregarded.....	181
Money decrees.....	184
In proceedings for contempt.....	668
Clerical mistakes in may be corrected.....	824
For accounting, etc.....	317

* See same title, INDEX TO FORMS, *post*.

DECREES AND ORDERS—*Continued.*

To be omitted in U. S. Court, Eq.....	180
How decree and order shall begin in U. S. Eq. Court.....	180

DEEDS, ETC.—*

Proving documents at hearing, etc.....	776
When may be read, without proof.....	776
To foreclose, when intended as a mortgage.....	346
Bill to redeem from, as a mortgage.....	319
Bill to cancel, etc.....	554
When deemed a mortgage, etc.....	319, 346

DEEDS ETC., BILLS TO CORRECT MISTAKES AND REFORM—*

When maintainable.....	597
Mistake must be mutual.....	597
Diligence required.....	598
Mistake as to law.....	598
as to fact.....	598
As to voluntary conveyances.....	599
As to wife's contracts as to lands of husband, etc.....	599
Complainant must show a right.....	600
Amount to give jurisdiction.....	600
Rescission of contracts.....	601
Statute of frauds.....	601
Frame of bill.....	601

DEEDS OF TRUST—*

Frame of bill to foreclose.....	356
---------------------------------	-----

DEFAULT—*

When may be taken, and how.....	55
Of complainant.....	55
Of defendant.....	56
Appearance may be entered on.....	56
Effect of.....	58
Right of defendant after.....	59
Setting aside, etc.....	60
Motion to.....	60
And decrees, where defendant is not personally notified.....	62
May be, on terms.....	62
When for irregularity, etc.....	65
Divorce not granted by.....	504
In U. S. courts of equity.....	803

DEFENDANT—

Appearing, entitled to notice.....	54
Names of, to be inserted in <i>subpœna</i>	41
To appear in fifteen days after service of <i>subpœna</i>	54
May have bill dismissed for non-service of copy.....	55
Proceedings against absent, etc.....	46
Notice by publication.....	46
Order of appearance, within what time.....	46
Unknown, etc.....	427

* See same title. INDEX TO FORMS, *post.*

DEFICIENCY—

Personal decree for, on foreclosure.....	382
Execution for.....	383
How obtained, etc.....	383

DEFENSE TO A SUIT—

Motion for security for costs.....	8
Different sorts of defenses.....	66
Demurrer.....	67
Plea.....	80
Answer.....	100
Disclaimer.....	118
To a supplemental bill.....	202
To a bill of revivor.....	219
To a bill in the nature of a bill of revivor.....	224
To a bill of review.....	244
To bills of interpleader.....	258
To bills to perpetuate testimony.....	269
To cross-bills.....	280
To bill to foreclose mortgage.....	363
To a bill to probate a foreign will.....	459
To bills for divorce.....	500
To bills for separate maintenance.....	534

DEMURRER—*

Nature and uses of.....	67
Certificate of counsel to.....	75
Where it lies.....	71
For want of parties, etc.....	71, 79
General.....	73
Special, what to be specified.....	73
Joint.....	73, 76
Michigan rule.....	74
Several causes of.....	75
Separate.....	75
Speaking.....	75
<i>Ore tenus</i>	76
Coupled with answer.....	76
To plea or answer, not tolerated.....	77
When to be put in.....	78
Joinder in.....	78
Hearing of.....	78
Effect of sustaining.....	78
Of overruling.....	78
When amendment allowed without costs.....	78
Noticed for argument.....	78
To a supplemental bill.....	202
To a bill of revivor.....	224
To a bill of review.....	246
To a bill of interpleader.....	258

* See same title, INDEX TO FORMS, *post*.

DEMURRER—Continued.

To a bill to perpetuate testimony.....	269
To a cross-bill.....	280
Amendments after.....	125
Time to	125
In U. S. courts of equity.....	808

DEPOSIT—

To be made on rehearing, with register.....	189
Accounts of register as to.....	770
Orders for the payment of.....	771
To be made on filing bill of review, as security.....	236

DEPOSITIONS—*

Of non-resident witnesses.....	155
Before whom may be taken.....	156
Notice to be given.....	156
When may be taken under commission.....	157
Written interrogatories.....	157
Witness may be compelled to appear and depose.....	157
Testimony may be written or taken stenographically.....	157
Witness may be examined orally.....	157
Witness shall be sworn.....	158
May be taken by stipulation.....	158
Court shall have power to regulate use of.....	158
How transmitted.....	158
Court has power to compel attendance of witnesses.....	159
May be used by either party.....	159
To perpetuate testimony.....	159
In U. S. courts of equity.....	820

DESERTION—*

A ground for divorce.....	479
Proof required.....	480
Must be willful, for two years, etc.....	480

DISCLAIMER—*

Nature of.....	118
Defendant may disclaim and answer, etc.....	119

DISCOVERY, BILLS OF—*

Nature of and when proper.....	249
--------------------------------	-----

DISMISSAL—

Of appeal in chancery, motion for.....	725
Terms may be imposed, on motion for.....	725

DIVORCE, BILLS FOR—*

Nature of.....	461
Causes for.....	462
Incompatibility of temper.....	463
Jurisdiction of, and where commenced.....	464
Complainant must be a resident, etc.....	464
Parties to.....	464

* See same title, INDEX TO FORMS, *post*.

DIVORCE, BILLS FOR—*Continued.*

Frame of bill.....	466
Must give the names and ages of children.....	466
Collusion.....	467
Oath of complainant.....	467
For natural impotency.....	468
For adultery.....	472
Circumstantial evidence of.....	472
Frame of bill charging.....	474
Conviction of crime.....	478
Desertion for two years.....	479
Habitual drunkenness.....	482
Extreme cruelty.....	485
What is.....	485
Failure to support.....	492
Divorces granted in another State.....	495
Suit to annul marriage.....	495
Suit to affirm marriage.....	496
Void marriages.....	496
Re-marriage, when allowed, etc.....	527
Abatement of suit by death of party.....	528
Reference to take proofs.....	497
Injunctions in.....	498
When taken before commissioner.....	498
Question to be asked of witnesses.....	498
Defenses to.....	500
Condonation.....	500
Other defenses.....	501
Recrimination.....	502
Cross-bills to.....	502
Hearing and decree.....	503
Trial by jury.....	504
Forming an issue for.....	503
Proofs.....	504
Decree.....	505
Dower, wife entitled to.....	506
Children, legitimacy.....	506
<i>Subpœna</i> to be served upon prosecuting attorney, when.....	467
Prosecuting attorney to appear for.....	467
Custody of, <i>pendente lite</i>	507
Permanent custody of.....	507
Restoration of property to wife.....	508
Claim for separate property can not be settled in divorce suit..	509
Cohabitation after divorce.....	509

(See ALIMONY.)

DOCUMENTS—

When may be read without proof.....	776
-------------------------------------	-----

DOWER—*

Wife entitled to, in divorce suits.....	506
---	-----

* See same title, INDEX TO FORMS, *post*.

DOWER—Continued.

Sale of, in partition suits.....	442
Investment of proceeds, how determined.....	443
Of insane wife.....	657
Proceedings to bar.....	658
When proper.....	657
Petition for.....	657
Appearance and answer of wife.....	658
Taking proofs.....	658
Commissioner's report.....	658
Action on report.....	659
Sale by guardian.....	659
Disposition of funds.....	659

DRUNKENNESS, HABITUAL—*

A ground for divorce.....	482
---------------------------	-----

EQUITY—

General principles of pleading in.....	4
--	---

EQUITABLE INTERESTS—

How reached, creditor's bill.....	395
Assignment of, to receiver.....	418

EQUITY RULES OF U. S. COURTS..... 799**EXAMINATION—**

Of witnesses in open court.....	151
In divorce suits.....	504
Of same, before commissioner.....	137, 498
Of witnesses, on commission.....	157
Of defendant, as a witness.....	153
Of witnesses, how time enlarged.....	140
Of parties, before commissioner.....	498
Accounting, before commissioner.....	145

EXCEPTIONS—*

To report of commissioner or master.....	147
--	-----

EXCEPTIONS TO ANSWER—*

Disposed of on special motion.....	103
In U. S. courts of equity.....	815

EXCEPTIONS TO A BILL—*

For scandal and impertinence.....	23
-----------------------------------	----

EXECUTION—

For deficiency in mortgage sale.....	383
--------------------------------------	-----

EXHIBITS—

To bill in chancery.....	19
--------------------------	----

EXTENSION—

Of time for pleading.....	55
To take proofs.....	140
For settling case.....	153

* See same title, INDEX TO FORMS, *post*.

EXTENSION—Continued.	
For suing out a writ of error.....	712
Of time of returns.....	723
FEIGNED ISSUES—TRIALS BY JURIES—*	
Nature of.....	166
Drawing up and settling	168
Michigan practice.....	169
In partition suits.....	430
FELONY—(See CRIME.)	
FORECLOSURE OF MORTGAGES—*	
General nature of.....	337
When proper.....	338
Of mortgages.....	338
Of deeds, absolute on face, given as a mortgage.....	346
Proceedings in.....	348
Parties to.....	341
Complainants.....	341
Defendants.....	342
Frame of bill.....	348
How rights of subsequent purchasers, etc., to be set out in bill	348
What must be set forth, proceedings at law, etc.....	350
Practice upon.....	359
<i>Lis pendens</i>	359
Reference to compute amount due.....	360
Affidavit of regularity.....	361
Proof as to infants, etc.....	360
Proceedings before commissioner.....	362
Hearing.....	362
Attorney's fees, on.....	366
Limitations and <i>laches</i>	365
Defenses to.....	363
As against assignee of notes secured by.....	364
Decree and sale.....	365
Sale, how made.....	370
Notice and time of.....	370
Adjournment of.....	371
By parcels.....	372
Enrollment of decree.....	372
Report and confirmation of sale.....	373
Re-opening sale, and re-sale.....	379
Writ of assistance.....	379
How obtained.....	380
Proceeds of sale, when brought into court.....	380
How disposed of.....	381
Surplus.....	381
Dower in, by divorced wife.....	381
Deficiency, personal decree for.....	381

* See same title, INDEX TO FORMS, *post*.

FORECLOSURE OF MORTGAGES—Continued.

Execution for.....	383
How to obtain.....	383
Answer to application for.....	383
Liability of third parties, etc., for.....	381
Installments due, proceedings upon.....	384
When bill dismissed.....	384
When proceedings to be stayed.....	384
Reference in certain cases.....	384
Default subsequent to decree.....	385
Premises, when entire, sold.....	385
Application of proceeds, etc.....	385
Strict foreclosure, whether allowable.....	386
Decree of.....	386

FORMER ADJUDICATION—*

Plea of.....	90
--------------	----

FORMER SUITS PENDING—*

Plea of.....	91
--------------	----

FORMS—(See INDEX TO FORMS, *post.*)**FRAUD—**

In acquiring service.....	47
How alleged in answer.....	103
In sale under foreclosure.....	379

GUARDIAN—

General, how appointed.....	428, 638
To give bond.....	428
In proceedings to bar dower of insane.....	658
Sale by.....	659
Disposition of funds by.....	659
In suits for partition.....	426, 446
Not to receive infant's money or property without security.....	771
<i>Ad litem</i> , how appointed, etc.....	620
And <i>prochein amis</i>	627
Sale of estate of infants, etc.....	634
Proceedings upon.....	626
Final report of.....	638

GUARDIAN AD LITEM—*

How appointed, etc.....	630
Duties and liabilities of.....	631
Answer of.....	631
In foreclosure suits.....	631
Not to receive infant's money, etc., without giving security.....	771

HABEAS CORPUS, ETC.—

History and nature of.....	702
Who entitled to writ.....	704
Who not entitled to writ.....	704
In what cases granted.....	704

* See same title, INDEX TO FORMS, *post.*

HABEAS CORPUS, ETC.—*Continued.*

Application for, how made.....	705
To whom made.....	706
Petition for.....	706
Penalty for refusing to consider, etc.....	707

HABITUAL DRUNKENNESS—*

What, sufficient ground for divorce.....	482
--	-----

HEARING—*

Of motions and petitions.....	187
Notice of.....	170, 186
When to be noticed.....	170, 186
By either party.....	170
Calendar, how made up.....	171
Course of proceeding on.....	172
Of a case out of its order.....	173
Original and cross-bill heard together, etc.....	173
Effect of former orders on.....	174
On pleadings, if no order to take proofs, etc.....	170
When bills are taken as confessed.....	170
Of demurrer.....	78
Of supplemental bill.....	206
Of bill of revivor.....	224
Of bill of interpleader.....	261
Of foreclosure bills.....	362
Of divorce suits.....	503
Of motions for temporary alimony.....	515
In suits for maintenance.....	541
In proceedings to bar dower of insane.....	658
In proceedings for contempt.....	666
In Supreme Court.....	738
Powers of Supreme Court on appeal.....	738
Records to be remitted to court below.....	739
Vexatious appeal.....	739
Writ of error.....	740

IDIOTS—LUNATICS—

Partition of land of.....	446
---------------------------	-----

IMPERTINENCE—*

In bills, nature of.....	23
Exceptions to bills for.....	23

IMPOTENCY—*

At time of marriage, a ground for divorce.....	468
--	-----

INCUMBRANCES—

How to set out in foreclosure bill.....	348
---	-----

INFANCY—*

Pleas of, without a <i>prochein ami</i>	88
Rule 87 U. S. Eq., relating to.....	825

* See same title, INDEX TO FORMS, *post*.

INFANTS—*

Suits for.....	627
Next friend.....	627
How appointed.....	627
Bond of next friend.....	629
Suits against.....	630
Guardian <i>ad litem</i> for.....	631
Petition for appointment of.....	631
Answer of, by guardian <i>ad litem</i>	110
Sale of real estate of, etc.....	634
Proceedings for.....	636
Proceeds of sale, how applied.....	637
Dower, how satisfied.....	637
Guardian's final report.....	638
General guardians, how appointed.....	638
Partition of lands of.....	426, 446, 638
In proceedings for dower.....	638
Guardian <i>ad litem</i> not to receive property of without security...	771
Reference of mortgage cases against.....	360
<i>Pro confesso</i> decree can not be taken against.....	59

INFORMATION—

Commencement of suit by.....	5
------------------------------	---

INFORMATION AND BELIEF—

Matters stated on, how to be sworn to.....	30
--	----

INJUNCTION—*

Nature and object of the writ.....	612
Jurisdiction of.....	613
In what cases granted.....	614
To restrain misapplication of public money.....	614
To restrain trespasses.....	614
Threatened injury to land.....	614
A diversion of water.....	615
A nuisance.....	615
Ejectment.....	615
Collection of a note.....	616
Conveyances, etc.....	616
Collection of taxes.....	616
Waste.....	617
Unlawful retention of water.....	617
In general, other instances, etc.....	617
Pleadings, in matters of injunction.....	619
When bill must be sworn to.....	619
Practice in.....	620
By whom granted.....	620
Notice of application for.....	621
No second application can be made.....	623
Indorsement of refusal to grant.....	623

* See same title, INDEX TO FORMS, *post*.

INJUNCTION—Continued.

When judges of adjoining circuits may grant.....	623
Dissolution of.....	624
Motion for.....	624
Notice of.....	625
Order dissolving.....	626
Restrictions upon right of commissioner to grant.....	620
On bills of interpleader.....	260
In divorce suits.....	498
In suits for separate maintenance.....	532
In corporation suits.....	644
In U. S. court of equity.....	826

INSANE WIFE—

Proceedings to bar dower of.....	657
----------------------------------	-----

INTERPLEADER, BILL OF—

Nature of.....	251
When will lie.....	251
Form of bill.....	255
Affidavit of non-collusion.....	256
Defenses to.....	258
Answer.....	259
Injunction, etc.....	260
Taking bill as confessed.....	260
Evidence.....	261
Hearing and decree.....	261
Costs.....	263

INTEREST—

On accounting before commissioner, may be allowed.....	145
--	-----

INTERROGATORIES—*

To examine foreign witnesses, taking deposition.....	157
Copies to be served on adverse party.....	157
Form of, in a bill.....	39

ISSUES—

On plea allowed, when to be taken.....	96
On filing general replication.....	96
Note of, to be delivered to the register.....	171
What causes to have priority from date of calendar.....	171
Feigned, how made.....	168
Drawing up and settling.....	168
In divorce cases.....	503

JOINDER OF PARTIES—

Misjoinder of.....	34
Nature of, etc.....	35
Where a single right is asserted, etc.....	35

JUDGMENTS—BILLS TO SET ASIDE—*

Jurisdiction of.....	590
For negligence.....	591

* See same title, INDEX TO FORMS, *post*.

JUDGMENTS—Continued.

Fraud	591
Want of jurisdiction.....	592
Bill by infant.....	592
For relief of sureties, etc.....	593

JURISDICTION—*

Of circuit court in chancery.....	1
Of Supreme Court.....	680
Plea to.....	82

JURAT—*

To sworn bill, answer or petition.....	40
--	----

JURY—*

Trial of issues of fact by.....	166
In divorce suits.....	503

LIENS—(See VENDOR'S LIEN, BILLS TO ENFORCE.)

Priority of, in creditor's bills.....	401
---------------------------------------	-----

LIMITATIONS—* LACHES.

To a bill of review.....	239
To bill for specific performance.....	293
To bill for partnership accounting.....	311
To a bill to redeem.....	322
To bills for separate maintenance	534
To bills to quiet title.....	549
To bills relating to trusts.....	562
To bill for subrogation.....	580

MAIL—

Service by, when and how.....	190
-------------------------------	-----

MAINTENANCE—*

Suits for, when proper.....	539
Practice and proceedings in.....	539
Petition for.....	540
Hearing and decree.....	541
Children, custody of, in.....	541
Support of wife and children.....	541
Injunction in.....	542

MAINTENANCE, SEPARATE—*

When granted.....	529
Grounds for.....	529
When proper.....	529
What must be shown.....	529
Proceedings to obtain.....	532
Where commenced.....	532
The bill for.....	532
Injunction, when allowed.....	532
<i>Laches</i>	534
Defenses to.....	534
Practice in, and decrees.....	534

* See same title, INDEX TO FORMS, *post*.

MAINTENANCE, SEPARATE—Continued.

Reference to master.....	535
Amount of allowance.....	536
Modification of.....	537

MARRIAGES—Suits to annul.....

Suits to affirm.....	496
Void, what are.....	496

MARSHALING ASSETS—

Nature of the remedy.....	583
General principles governing.....	583
Marshaling assets of partnership.....	586
Inverse order of alienation.....	586

MASTERS IN CHANCERY—

Commissioners to discharge duties of.....	145
U. S. court of equity.....	823
Duties of.....	821
Reference to.....	821
Examination before.....	822
Accounting before.....	323
Exception to report of.....	824

MISJOINDER—

Of parties to bill.....	34
-------------------------	----

MISTAKES, BILLS TO CORRECT AND REFORM DEEDS, ETC.—

When will lie.....	597
Diligence.....	598
Mistake as to law.....	598
as to fact.....	598
must be mutual.....	597
As to voluntary conveyances.....	599
As to wife's contract, etc.....	599
Complainant must show a right.....	600
Amount to give jurisdiction.....	600
Statute of frauds.....	601
Rescission of contracts.....	601

MORTGAGES—(See FORECLOSURE OF MORTGAGES.)**MOTIONS—***

Nature of.....	186
Of course or special.....	186
What should contain.....	186
When must be filed.....	186
Notice of.....	186
(See NOTICE.)	
When to stand over.....	187
To be made on the day of notice.....	186
When argued.....	187
For stay of proceedings.....	187
For continuance.....	187

* See same title, INDEX TO FORMS, *post*.

MOTIONS—*Continued.*

For rehearing.....	189
Special notice of, how to be given.....	774
For continuance.....	187
In the Supreme Court	724
Special motion book.....	725
Special motion days.....	724
Notice of motion.....	725
Motion docket.....	725
Motion to dismiss appeal in.....	725
To dismiss writ of error, etc.....	726
For further return, when record is imperfect, etc.....	726
To dismiss appeal in chancery.....	726
To dismiss may be granted, or denied on terms.....	726
Notices of motions, what time allowed on.....	725
Statement of, to be entered on motion docket.....	725
How called.....	725

MOTION DOCKET—

To be provided by clerk.....	725
Motions to be entered in, etc.....	725

MULTIFARIOUSNESS—*

Nature of, and what is.....	20
How taken advantage of.....	20

NE EXEAT—*

Nature of, and when proper.....	555
Bill for.....	556
How obtained.....	557

NEXT FRIEND—*

In suits by infants.....	627
How appointed.....	627
Bond of.....	629
To give security before receiving money of infants.....	629

NON-COLLUSION—

In interpleader suits.....	256
In creditor's bill.....	404
In divorce suits.....	467

NON-RESIDENTS—

Complainant to give security for costs.....	8
Notice by publication to.....	46
Proof of.....	48
Order of appearance.....	50
Service of copy of.....	51

NOTES OF ISSUE—

When and how served.....	171
--------------------------	-----

NOTICE—

To be underwritten to <i>subpoena</i>	41
---	----

* See same title, INDEX TO FORMS, *post*.

NOTICE—*Continued.*

By publication.....	46
How obtained.....	46
Essentials of affidavit for.....	47
Proof of publication.....	48
Of appearance.....	54
Of hearing, after testimony taken before commissioner.....	138
When testimony taken in open court.....	152
May be countermanded.....	152
To commissioner of order closing proofs.....	139
To solicitor.....	139
Of examination of witnesses.....	139
Of application to enlarge time to take proofs.....	140
Of hearing exceptions to report.....	147
Of order <i>nisi</i> to confirm report.....	147
That cause is at issue.....	152
Of taking of deposition.....	153
Of receipt of deposition.....	158
Of application for commission.....	161
To produce written instrument at trial.....	163
To register to place cause on calendar.....	171
Of argument of motion.....	186
Of application for stay of proceedings.....	187
Of special motion.....	188
Of petition for rehearing.....	189
Of sale of real estate on foreclosure.....	370
Of sale by receiver.....	407
Of application for injunction.....	621
Of motion in U. S. equity courts.....	800

NUNC PRO TUNC—*

Decree, clause in.....	181
------------------------	-----

OATH—*

To a bill, when necessary.....	30
For divorce.....	467
To a creditor's bill.....	405
To an answer.....	107
Waiver of, to.....	108
To a plea or answer, before whom administered.....	107
Form of oath.....	158
To amendments to sworn creditor's bills.....	405
To be administered to witnesses, etc.....	158

(See AFFIDAVITS.)

OBJECTIONS—*

To master's or commissioner's report.....	148
---	-----

ORAL ARGUMENTS—

Time allowed on in Supreme Court.....	736
---------------------------------------	-----

ORDERS—*

Common and special.....	182
-------------------------	-----

* See same title, INDEX TO FORMS, *post*.

ORDERS—*Continued.*

Made in chambers.....	773
(See DECREES AND ORDERS.)	

PAPERS—

How served.	190
By mail.....	190
Where several defendants or solicitors.....	190
On party prosecuting or defending in person.....	191

PARAGRAPHS—

Bill must be divided into.....	40
Prayer for relief.....	27
Answer.....	106

PAROL CONTRACTS—

Specific performance of.....	291
------------------------------	-----

PARTIES—*

To bills generally.....	31
Who should be made.....	32
Where very numerous, etc.....	32
Nominal.....	33
How described.....	33
Persons under disability.....	33
Joinder of.....	35
Want of proper.....	34
Misjoinder of.....	34
To a supplemental bill.....	197
To bills in nature of bills of revivor.....	223
To bills of review.....	235
To bills for specific performance.....	295
To bills to redeem.....	323
Complainants.....	323
Defendants.....	325
To bills to foreclose mortgages.....	341
Complainants.....	341
Defendants.....	342
To a creditor's bill.....	399
Complainants.....	399
Defendants.....	400
To partition suits.....	425
Complainants or petitioners.....	425
Defendants.....	426
Unknown parties in partition suits.....	427
Process against.....	427
To bills to probate foreign will.....	456
To bills for divorce.....	465
To bills relating to trusts.....	563
To bills for subrogation.....	580
To bill for contribution.....	678
To writ of <i>certiorari</i>	702

* See same title, INDEX TO FORMS, *post*.

PARTIES—*Continued.*

Unknown defendants in partition.....	427
How made parties.....	427
Publication as to.....	427

PARTITION SUITS—*

Nature of, and how instituted.....	422
Of personal property.....	425
Parties to.....	425
Complainants or petitioners.....	425
Defendants.....	426
Unknown.....	427
Guardian for minors.....	428
Bond required.....	428
Bill for.....	429
What to set forth.....	429
Amendments to.....	430
Answer to bill.....	429
Feigned issues upon.....	430
Reference, and proceedings upon.....	435
On bill confessed.....	435
To ascertain situation of premises.....	435
Proceedings to decree.....	436
Commissioners, appointment of.....	436
Vacancies among.....	436
Oath to.....	436
Partition, how made by.....	436
Instructions to.....	437
Notice of meeting of.....	437
Joint action.....	437
Fees of.....	437
Report of.....	437
Report set aside.....	438
Report, confirmation of.....	438
On all parties named.....	438
On all persons interested.....	438
On all persons claiming.....	438
Persons not affected.....	438
Partition among heirs.....	439
Partition by sale.....	440
When court to order sale.....	440
Order directing terms of credit.....	440
Separate securities.....	440
To whom delivered.....	441
Moneys to be brought into court.....	441
Application for.....	441
Proceedings thereon.....	441
Distribution of, incumbrancers.....	442
Applied and invested.....	442

* See same title, INDEX TO FORMS, *post*,

PARTITION SUITS—Continued.

Discharge of, incumbrances.....	442
Sale of dower or life estate.....	442
Investment of proceeds, how determined.....	443
If estate in dower.....	443
If estate by courtesy.....	443
Sale, how conducted.....	444
Report of.....	444
Conveyances.....	444
Costs.....	448

PROCEEDS, DISTRIBUTION OF—

Shares of infants.....	446
of unknown owners.....	443
of tenants in dower or for life.....	442
Security to refund.....	445
How taken.....	445
Suits upon securities.....	446
Lands of infants and lunatics.....	446
of infants.....	446
of lunatics.....	447
Hearing and decree.....	447

DECREE OF PARTITION—

Owerty.....	448
Receiver.....	449
Appeal.....	449
Voluntary partition.....	449
Incumbrances.....	449
Improvements.....	449
Rents and profits.....	450
Opening decree.....	450

PARTNERS—

Contribution between.....	676
---------------------------	-----

PARTNERSHIP MATTERS—BILLS RELATING TO—*

When a dissolution will be decreed.....	307
Account between partners.....	309
Appointment of a receiver.....	311
When appointed.....	312
Limitations.....	311

PARTY—

How examined as a witness.....	153
May be examined orally in open court.....	153

PETITIONS—*

To set aside decree when defendant is not personally notified...	61
For a commission to take testimony.....	160
For leave to file supplemental bill.....	201, 765
For leave to file bill of review.....	237
To annul marriages.....	495

*See same title, INDEX TO FORMS, *post*.

PETITIONS—*Continued.*

To affirm marriage.....	496
For temporary alimony in divorce suits.....	513
For permanent alimony.....	524
For separate maintenance.....	532
For maintenance.....	540
For appointment of guardian <i>ad litem</i>	631
For appointment of a next friend.....	627
For rehearing.....	189
In the Supreme Court.....	741

PERPETUATION OF TESTIMONY—

Commission may issue to.....	159
Notice to be given.....	159

PLEADING IN EQUITY—

General principles of.....	4
----------------------------	---

PLEAS TO A BILL—*

Nature of.....	80
When proper.....	82
Signing of.....	94
To be put in within fifteen days.....	55
When to be sworn to.....	86
Time to reply to or amend bill.....	96
When may be noticed for argument.....	96
If allowed, when to take issue on.....	96
To the jurisdiction.....	82
To the person.....	83
To the bill.....	83
In bar.....	84
Frame of.....	84
To a supplemental bill.....	203
To a bill of revivor.....	224
To a bill of review.....	244
Of statute of limitations.....	92
Of release.....	92
Of stated account.....	93
Of former suit pending.....	91
Of former adjudication.....	90
When to be filed.....	95
To a cross-bill.....	281
In bar.....	84
Frame of.....	84
In bar of writ of error.....	731
To assignment of errors.....	731
Of release of errors.....	731
Of limitations.....	732
Replication to.....	95, 96
Amendment of bill after.....	95
Demurrer to, not proper.....	95

* See same title, INDEX TO FORMS, *post*.

PLEAS TO A BILL—Continued.

Saving benefits of, to the hearing.....	97
Effect of allowing pleas.....	96
Effect on finding on facts stated in.....	97
Argument of plea—Dismissal of bill.....	96
Default of defendant in answering.....	96
Allowing to stand for an answer.....	98
When to be supported by answer.....	98
Of release, must be.....	92
Of stated account, should be.....	92
Certificate of counsel that it is well founded in point of law...86,	751
Affidavit of defendant to, etc.....	86
To bill charging fraud.....	751

PRACTICE—

Customary, to govern, in absence of a statute or rule.....	3
--	---

PRACTICE IN THE SUPREME COURT—*

Jurisdiction of the Supreme Court.....	680
Appellate.....	681
To establish rules of practice.....	681
Power to compel discovery of books, papers.....	681
To prescribe practice in certain cases.....	681
To prescribe powers of circuit court, etc.....	681
Equal division of the court.....	682
Majority decision.....	682
Source of power to review.....	682
Non-judicial controversies.....	682
What the court reviews.....	683
Will not determine facts.....	686
Rules of.....	687
Writs of <i>certiorari</i>	699
Common law writ.....	699
Return to the writ.....	700
By whom allowed.....	700
When allowed.....	701
Notice of issuing, etc.....	700
Issue, <i>teste</i> , and return.....	700
When return of, to be made.....	700
Limitations of.....	701
Questions of law on, only considered.....	702
Parties defendants to.....	702
Who may prosecute the writ.....	702
<i>Habeas corpus</i> and <i>certiorari</i>	702
<i>Habeas corpus</i> , history and nature of.....	702
Who entitled to the writ.....	704
Who not entitled.....	704
In what cases granted.....	704
Application for, how made.....	705
To whom made.....	706

* See same title, INDEX TO FORMS, *post*.

PRACTICE IN THE SUPREME COURT—*Continued.*

Petition for, how verified.....	706
Penalty, for refusing to consider, etc.....	707
Writs of error.....	707
Nature of, and when it will lie.....	707
When it will not lie.....	709
By whom brought.....	710
Joinder of parties to.....	710
Against whom brought.....	710
Limitations—When to be brought.....	711
Extension of time for.....	712
Appeals from circuit courts in chancery.....	713
Who may appeal.....	713
Jurisdiction of.....	713
When appeals lie.....	714
When they do not lie.....	714
Appeal from tax decree.....	717
Claiming an appeal.....	717
Bond of, how approved.....	717
Insufficient bond.....	718
Notice of appeal.....	718
Settling case, heard in open court.....	720
Register's return.....	722
Extending time for.....	723
What it includes.....	723
Motions, special motion book.....	724
Special motion days.....	724
Notice of.....	725
Docket.....	725
To dismiss appeal.....	725
To dismiss writ of error.....	726
Amendments of record.....	727
Further return of.....	727
Assignment of errors.....	728
On charge of court.....	730
Pleas in bar, to.....	731
Of release of errors.....	731
Of limitation to.....	732
Replication.....	732
Trial of issue of fact.....	732
Printed record.....	733
Printed briefs.....	734
The argument.....	736
Time allowed for.....	736
Order of.....	736
Calendar of court.....	737
What are calendar cases.....	737
Call of.....	738
Hearing.....	738

PRACTICE IN THE SUPREME COURT—*Continued.*

Powers of Supreme Court on appeal	738
Records, etc., to be remitted to court below	739
Vexatious appeals	739
Vexatious suing out of writ of error	740
Rehearing, application for	741
When granted, etc.	741
Costs	742
Taxation of	744
Retaxation of	745

PRAYER—

For relief on bill	26
Must be paragraphed	27
For process not necessary	28
To answer in the nature of a cross-bill	122

PREFERENCE—

On calendar, what causes to have	171
--	-----

PROCESS—

When returnable	44
May be renewed of course, if not served	42
To compel attendance of witnesses	138, 159
Upon decrees, final, etc.	184
Not until decree is enrolled	184

PROCESS FOR APPEARANCE—*

Prayer for, in bill	28
<i>Subpœna</i>	41
Service and return of	43
Notice by publication	46
Essentials of affidavit for	47
The order of appearance	46
Time of	46
Fraud in procuring service	47
Publication and proof	48
Service by copy or order of appearance	51
Acceptance of service	52
Attachment to compel answer	52
How obtained	52
To a supplemental bill	262
Unknown defendants in partition suits	427
Upon cross-bill	279

PROCHEIN AMI—(See NEXT FRIEND.)

Required to give bond for costs	629
---------------------------------------	-----

PUIS DARREIN CONTINUANCE—*

Cross-bill in nature of plea of	277
---------------------------------------	-----

RECEIVER—*

Appointment of, in suits between partners	311
When appointed	312

* See same title, INDEX TO FORMS, *post*.

RECEIVER—Continued.

In creditor's bill, etc.....	406
On several bills.....	407
Their powers.....	406
Security by.....	407
Accounts of.....	408
May be appointed in vacation.....	408
Upon dissolution of corporation.....	650
Commission to.....	652
To retain certain money..	652
Under control of court.....	654
Accounts of.....	654

RECORDS OF INFERIOR COURTS—

To be printed.....	733
Amendment of.....	727
When to be furnished to the court.....	733
Time of printing and serving....	733
Penalty for making too prolix.....	734

RECRIMINATION—

In divorce suits.....	502
-----------------------	-----

REDEEM, BILLS TO—*

Nature of.....	318
Deeds absolute on face, when deemed as a mortgage.....	319
Who may redeem.....	321
Within what time to be filed.....	322
Terms of redemption.....	326
Parties to.....	323
Complainants.....	323
Defendants.....	325
Frame of bill.....	328
Decree.....	335
Michigan practice.....	335

REDEMPTION—(See REDEEM, BILLS TO.)**REFERENCE—**

To compute amount due on mortgage.....	360
As to surplus on mortgage sales.....	381
By consent, on creditor's bills.....	405
To take proofs in partition suits.....	425
In divorce suits, how obtained.....	497

REFORM DEEDS, ETC.—(See DEEDS, ETC., BILLS TO CORRECT AND REFORM, ETC.)**REGISTER—**

To keep a common rule book.....	183
To issue commissions to take testimony.....	157
To open and file commission returned.....	158
To give notice of receipt of depositions.....	158
To make up calendar.....	171

* See same title, INDEX TO FORMS, *post*.

REGISTER—Continued.

Not to file illegible papers.....	779
Deposits for rehearing to be paid to him.....	189
Accounts of money deposited, how kept, etc.....	700
May tax costs.....	764
Of proceedings, to be kept by commissioner.....	136
Orders of commissioner to be filed with.....	136

REGULARITY—

Affidavit of, in mortgage cases.....	361
Affidavit of, in divorce cases.....	467

REHEARING—

Motion for.....	189
Papers to be furnished on.....	189
Certificate of counsel, etc., on application for.....	189
Deposit on, to be made in ten days.....	189
In the Supreme Court.....	741
Application for.....	741
When granted.....	741

RELEASE—*

Plea of, must be supported by answer.....	93
Of errors.....	731

RELIEF—

Prayer for, in a bill.....	26
Must be paragraphed.....	27
Affirmative, upon answer.....	121

REPLICATION—*

Nature of.....	132
Within what time to be filed.....	132
Issue made by.....	133
Effect of filing.....	133
Withdrawing.....	134
If not filed, plea admitted.....	96
To plea, when to be filed.....	96
Special, not without leave.....	134
To a supplemental bill.....	205
Omission to file, effect of.....	96
Amendment of bill after.....	134

REPORT—*

Of commissioners to make partition.....	437
Of testimony taken by commissioner.....	146
Objections to, must be made before the commissioner.....	148
Separate, when may be made.....	146
Order to confirm <i>nisi</i>	147
Of mortgage sale.....	373
Upon petition to bar dower of insane.....	653
Of sale in partition.....	444
Of proofs in partition suits.....	437
Of master, U. S. Eq. rules.....	824

* See same title, INDEX TO FORMS, *post*.

RESTRICTIONS—

On power of commissioners.....	762
--------------------------------	-----

RETURN—

Of service by officer.....	44
Of commission to take depositions.....	158
To writ of error or <i>certiorari</i>	700
Time for, may be extended.....	688
Motion to dismiss, for want of.....	688
How further time to, obtained.....	688
To appeal in chancery, when to be made.....	690
Motion to dismiss, for want of.....	726
May be granted or denied on terms.....	726
How further time obtained.....	690
To writ of error, when parties have severed.....	689

RETURN DAY—

Of process.....	42
Service may be on or before.....	43
To writs of error and <i>certiorari</i>	688
Return to be filed on or before.....	688
To summons on information.....	691

REVIEW, BILLS OF—*

Nature of, and when proper.....	229
Where a bill lies.....	229
For error in law.....	232
For newly discovered evidence.....	233
Parties to.....	235
Deposit.....	236
Security.....	236
Leave to file petition for.....	237
Performance of decree.....	237
By infants.....	235
Petition for leave to file.....	237
Within what time to be brought.....	239
<i>Laches</i>	244
Form of bill.....	240
Amendment to.....	243
Binding effect of decrees.....	243
Defenses to.....	244
Pleas to.....	244
Demurrer to.....	246
Answer to.....	247

REVIVOR, BILLS OF—*

Nature of.....	214
Against whom to be filed.....	214
When proper.....	215
Frame of bill.....	216
Must pursue original bill.....	216

* See same title, INDEX TO FORMS, *post*.

REVIVOR, BILLS OF—*Continued.*

What need not be set forth.....	216
Michigan practice.....	216
Defenses to.....	219
Order of revivor.....	219
Assignment of subject-matter of suit.....	219

BILLS IN THE NATURE OF—

Nature and uses of.....	221
Parties to.....	223
Frame of.....	223
Defenses to and proceedings upon.....	224

REVIVOR AND SUPPLEMENT—

Nature of, and when proper.....	226
Practice upon.....	227

RULE—

Common, how entered.....	183
By consent, not vacated.....	183
For further return, how enforced.....	45

RULE BOOK—

Rule by consent to be entered in.....	183
Special motions and rules, etc.....	182
To be provided, and denominated as such.....	183

RULES—

Of practice in the Supreme Court.....	687
Chancery, of the circuit court.....	746
For courts of equity of the United States.....	799

SALES—

On foreclosure.....	370
Deed on.....	370
Notice of.....	370
Adjournment of.....	371
By process.....	372
Report of.....	373
Confirmation of.....	373
Distribution of surplus on.....	381
Re-opening and re-sale.....	379
Of real estate, by receiver.....	407
Of desperate debts, by receiver.....	407

SCANDAL AND IMPERTINENCE—*

Of what it consists.....	23
In a bill.....	23
Exceptions to, for.....	23
When court, on its own motion, will direct it to be eliminated	24

SECURITY—

When required for costs.....	8
Required of guardian <i>ad litem</i> , when.....	629

* See same title, INDEX TO FORMS, *post*.

SECURITY—Continued.	
Required of guardian, on sale of infant's estate.....	635
Of guardian for insane wife.....	659
Required on bill of review.....	236
To be given by receiver.....	407
SEPARATE MAINTENANCE—*	
When granted.....	529
What must be shown.....	529
Proceedings to obtain.....	532
Where commenced.....	532
The bill.....	532
Injunction.....	532
Defenses to.....	534
Laches.....	534
Practice, and decrees in.....	534
Reference to commissioner.....	535
Amount of allowance.....	537
Modification of allowance.....	537
SEQUESTRATION—*	
Of property of corporation.....	643
Of property of party in contempt.....	669
SERVICE—	
Acceptance of.....	52
Of papers.....	190
By mail.....	190
When several defendants.....	190
On party prosecuting or defending in person.....	191
When required.....	191
How time computed.....	191
SETTLING CASE—	
How made and settled.....	153
Extension of time for.....	153
What is.....	154
SIGNING—	
Of bills....	29
How signed and by whom.....	29
Of answer.....	106
SPEAKING DEMURRERS—	
What are, and nature of.....	75
SPECIAL ORDERS—	
What are.....	182
SPECIFIC PERFORMANCE, BILLS FOR—*	
Nature of, and when proper.....	284
Requisites of contract.....	284
Discretionary with court.....	285
When will be enforced.....	286
Contracts relating to personalty and personal services.....	289

*See same title, INDEX TO FORMS, *post*.

SPECIFIC INFORMATION, BILLS FOR—*Continued.*

Of a lost instrument.....	290
Of an award.....	290
Mining contract.....	291
Parol contracts.....	291
Statute of frauds.....	291
<i>Laches</i>	293
Delay in performance.....	294
Vendor against purchaser or his assignee.....	294
As to lands out of the State.....	295
Parties to.....	295
Frame of bill.....	296
Tender.....	297
Decree.....	302
Declaration of right to.....	302
Reference as to title.....	303
Delivery of deeds, etc.....	304
Payment of purchase money, etc.....	304
Dower rights.....	304

STRICT FORECLOSURE—*

Whether allowable.....	386
------------------------	-----

SUBPCENA—(See PROCESS FOR APPEARANCE.)

SUBROGATION—*

Nature of.....	572
In what cases it applies.....	572
Suretyship or guaranty.....	573
Junior incumbrancers, etc.....	575
Who may be subrogated.....	576
Who can not be subrogated.....	579
Limitations.....	580
Parties.....	580

SUITS FOR MAINTENANCE—(See MAINTENANCE.)

SUPREME COURT—(See PRACTICE IN THE SUPREME COURT.)

SUPPLEMENTAL BILLS—*

Nature of, and when proper.....	195
When to be filed.....	197
Parties to.....	197
Form of.....	198
Michigan practice.....	199
Prayer of.....	199
Petition for leave to file.....	201
Process upon, etc.....	202
Defenses to.....	202
Demurrer.....	202
Plea.....	203
Practice as to demurrers and pleas.....	204
Answer.....	204

* See same title, INDEX TO FORMS, *post.*

SUPPLEMENTAL BILLS—*Continued.*

Replication.....	205
Evidence.....	205
Hearing of.....	206
Entitling orders in.....	206
Dismissing bill.....	206

BILLS IN THE NATURE OF—

When proper.....	207
Form of.....	209

BILLS TO CARRY DECREES INTO EXECUTION—

Nature of.....	211
Form of.....	212

REVIVOR AND SUPPLEMENT—

Nature of, and when proper.....	226
Practice upon.....	226

SWEARING TO BILLS—

When required.....	30
To a bill of interpleader.....	256

TAKING BILLS AS CONFESSED—*

Proceedings following service of <i>subpœna</i>	54
Notice of appearance.....	54
Default.....	55
Of complainant.....	55
Of defendant.....	56
Affidavit of non-appearance.....	56
Effect of default.....	58
When service by publication.....	58
When service is personal.....	59
Right of defendant after default.....	59
Setting aside default and decree.....	60

TESTIMONY—(See DEPOSITIONS.)

Testimony taken in open court.....	151
When judge may reject.....	155
Settling case.....	153
Production of books and papers.....	163
Prior to hearing.....	164
Portions may be sealed up.....	164
Documents in hands of third persons.....	164

TESTIMONY—BILLS TO PERPETUATE.

Nature of proceedings.....	265
Form of bill.....	265
Defenses and proceedings.....	269
Demurrer.....	269
Answer.....	270
Proceedings under statute.....	159
Commission may issue.....	159
Affidavit.....	159
Notice.....	159

* See same title, INDEX to FORMS, *post*.

TITLE—BILLS TO QUIET.

When proper, and nature of.....	543
Valid right must be shown.....	544
Cloud upon title defined.....	545
When bill may be maintained.....	546
Tax title.....	547
When not maintainable.....	548
Parties.....	548
Necessary allegations of bill.....	549
<i>Laches</i>	549

TRUSTS, BILLS RELATING TO—*

Nature of.....	558
Powers of courts of equity to protect trusts.....	558
Removal of trustee.....	560
Appointment of trustee.....	560
Construction of instrument creating.....	561
Construction of will.....	561
Delinquent assignee.....	561
Settlement of estates.....	562
Grantor no power to change terms of.....	562
Limitations.....	562
Bill for accounting against trustee.....	562
Parties to bill.....	563

UNKNOWN OWNERS—

In partition suits.....	427
Proceedings against, in.....	427
Interest of, in.....	427

VENDOR'S LIEN—*

Bills to enforce, nature of.....	603
Principles governing.....	603
Against whom exists.....	603
In what States recognized.....	603
How created.....	604
As to personal property.....	607
Waiver of lien.....	607
Not assignable or transferable.....	608
Frame of bill for.....	609
Decree for.....	611

WAIVER—

Of vendor's lien.....	607
Of answer under oath.....	108

WASTE, BILLS TO RESTRAIN—*

Nature of, and when proper.....	567
Waste defined.....	568
Injunction to restrain.....	568-617

WILLS, FOREIGN—*

Bills to probate.....	456
-----------------------	-----

* See same title, INDEX TO FORMS, *post*.

WILLS, FOREIGN—*Continued.*

When allowed.....	456
Bill and answer.....	457
Defense to.....	459
Practice upon.....	459
Testimony upon.....	459
Decree and its effect.....	460
Effect of probate.....	460
Transcript to be filed.....	460
Appeal.....	460

WITNESSES—

Examination of, before commissioner.....	140
Commission for examination of.....	157
Non-resident, to be examined on interrogatories.....	157
Stipulation to take testimony of.....	158
Court may call either party as.....	153
<i>Subpoena</i> to compel attendance of.....	158
May be examined in open court.....	151
Questions to be asked of in divorce cases.....	498

WRIT OF ASSISTANCE—

May issue.....	380
How obtained.....	381

WRITS OF ERROR, ETC.—*

Nature of, and when it will lie.....	707
When not lie.....	709
By whom brought.....	710
Against whom brought.....	710
Joinder of parties to.....	711
Notice to other defendants.....	711
Limitations of.....	711
Extension of time for.....	712
Issue, <i>teste</i> , and return of.....	700
Notice of issuing, etc.....	700
When return to be made to.....	688, 700
Time for return may be extended.....	688
Time in which to assign errors when no bill of exceptions is settled.....	689
Motion to dismiss for want of prosecution.....	688
For further return, how time obtained.....	688
Terms may be imposed on motion to dismiss.....	689
Compelling parties to sever or join in.....	689

* See same title, INDEX TO FORMS, *post*.

INDEX TO FORMS.

(See GENERAL INDEX, *ante*, page 829.)

ABATEMENT—

Forms of Pleas of.

No. 36.	To the jurisdiction of the court.....	87
No. 37.	Coverture.....	88
No. 38.	Infancy, without <i>prochein ami</i>	88
No. 40.	Complainant an alien enemy.....	88
No. 34.	Commencement of pleas, etc.....	87

ABSTRACTS—

No. 313.	Form of pleadings.....	792
----------	------------------------	-----

ACCOUNT—

Form of.

No. 47.	Plea of, stated.....	93
No. 148.	Bill for, between partners.....	315
No. 150.	Decree for, between partners.....	317
No. 151.	Final decree for, on dissolution.....	317

ADDRESS—

<i>Forms of, for bills and petitions</i>	37
--	----

ADMINISTRATOR—

No. 39.	Form of plea never was.....	88
---------	-----------------------------	----

ADULTERY—(See DIVORCES, ETC.)

Forms of Bills for Divorce for.

No. 195a.	By husband.....	475
No. 196.	By wife.....	476

AFFIDAVITS—

Forms of.

No. 5.	Of service of <i>subpoena</i>	45
No. 6.	For order of appearance.....	49
No. 7.	For publication—non-residence.....	49
No. 8.	Same—Defendant can not be found.....	49
No. 9.	Same—Defendant concealed.....	49
No. 14.	Of failure of complainant to serve copy of bill.....	55
No. 15.	Of non-appearance.....	56
No. 16.	On default.....	56
No. 33.	Of defendant that plea is not interposed for delay, etc.....	86
No. 104.	Of jurat to affidavit.....	192
No. 105.	Same—When by solicitor.....	193

AFFIDAVITS—*Continued.*

No. 129a.	To bill of interpleader.....	257
No. 136.	To bill to perpetuate testimony.....	269
No. 147.	To bill for injunction.....	314
No. 195.	Of non-collusion in divorce suit.....	471
No. 241.	That judge is absent from county.....	621
No. 269.	Of service of notice of appeal.....	720
No. 270.	For order granting extension of time for return of record	724
No. 324.	For order to close proofs.....	796

AGREEMENT—

No. 309.	Form of, to submit a cause on written argument....	791
----------	--	-----

ALIMONY—

Forms of.

No. 207.	Petition for, <i>pendente lite</i>	514
No. 208.	Affidavit in support of.....	515
No. 209.	Notice of motion for.....	515
No. 210.	Order for.....	517
No. 211.	Demand for.....	518
No. 212.	Order to show cause, etc.....	519
No. 213.	Attachment for contempt.....	520
No. 214.	Return of sheriff to.....	520
No. 215.	Interrogatories in contempt, etc.....	521
No. 216.	Answer to interrogatories, etc.....	521
No. 217.	Order of reference as to allowance of.....	522
No. 218.	Report of commissioner on.....	522
No. 219.	Order confirming report of commissioner.....	523
No. 220.	Short form of decree for, etc.....	523
No. 221.	Decree for permanent alimony.....	527

AMENDMENTS—

To BILL—Form of.

No. 75.	Petition for leave to file, after replication.....	130
No. 76.	Order granting leave, after demurrer.....	130
No. 294.	After a plea to a part is allowed.....	787
No. 77.	To a bill.....	130

To ANSWER—Form of.

No. 319.	To answer.....	795
----------	----------------	-----

To PLEA—Form of.

No. 320.	To a plea.....	795
----------	----------------	-----

To DECREES—Form of.

No. 318.	To a decree.....	795
----------	------------------	-----

ANSWERS TO BILLS—

Forms of.

Miscellaneous commencements and conclusions.....		112
No. 66.	General frame of.....	114
No. 67.	Affidavit to.....	115
No. 68.	Short	115
No. 69.	Infants, by guardian <i>ad litem</i>	115
No. 70.	Statement in, claiming statute of frauds.....	116
No. 71.	Conclusion, insisting on remedy at law.....	116

ANSWERS TO BILLS—*Continued.*

No. 72.	Disclaimer.....	120
No. 73.	Answer and disclaimer.....	120
No. 74.	Praying affirmative relief.....	123
No. 46.	In support of a plea of release.....	92
No. 48.	To a part, and demurrer to residue.....	94
No. 306.	Further answer after exceptions and amendment...	790
No. 310.	Exceptions to, for insufficiency.....	791
No. 311.	For scandal and impertinence.....	792
No. 312.	Order to expunge for scandal, etc.....	792
No. 319.	Amendment to.....	795

APPEALS—

No. 265.	Claim of appeal.....	718
No. 266.	Bond on.....	719
No. 267.	Notice of application for approval of bond.....	719
No. 268.	Notice of appeal.....	720
No. 269.	Affidavit of service of notice of.....	720

APPEARANCE—(See PROCESS OF APPEARANCE.)

No. 6.	Form of affidavit for order of.....	49
No. 10.	Form of order of.....	50
No. 12.	Form of proof of service of.....	51
No. 13.	Form of notice of.....	54

ARGUMENT—

No. 314.	Form of brief and points on hearing.....	793
----------	--	-----

ASSIGNMENT OF ERROR—

No. 274.	Form of.....	731
No. 275.	Plea of release of.....	732
No. 276.	Plea, statute of limitation.....	732

ATTACHMENT—

Form of.

No. 283.	Affidavit to obtain, for not answering.....	783
No. 284.	Order for, for not answering.....	783
No. 292.	On third answer, as not sufficient.....	787
No. 213.	For contempt for not paying alimony.....	520
No. 262.	Affidavit in support of, for contempt.....	670
No. 263.	Order for, for contempt.....	671

BILLS IN CHANCERY—

Form of.

	Constituent parts of original bill.....	37
	Prayer for <i>subpœna</i>	39
	Prayer for injunction.....	39
No. 106.	Supplemental bill for specific performance, etc.....	199
No. 107.	Supplemental, against assignee of a bankrupt.....	200
No. 112.	Original in the nature of a supplemental bill.....	209
No. 113.	To carry decree into execution.....	212
No. 114.	Of revivor, before decree.....	217
No. 115.	Of revivor, after decree.....	218
No. 119.	In the nature of a bill of a revivor.....	224
No. 120.	Of revivor and supplement.....	227
No. 124.	Of review, upon error in law.....	242

BILLS IN CHANCERY—*Continued.*

No. 125.	Of review, upon newly-discovered matter.....	242
No. 129.	Of interpleader.....	256
No. 135.	To perpetuate testimony.....	268
No. 137.	Cross-bill to foreclose suit.....	275
No. 138.	Cross-bill, in the nature of a plea <i>puis darrein</i> continuance.....	277
No. 139.	Specific performance, vendee v. vendor.....	298
No. 140.	Specific performance, vendor v. vendee.....	299
No. 141.	Specific performance, on bond for a deed, etc.....	300
No. 142.	Specific performance, of agreement for a lease, etc.,	301
No. 146.	For dissolution of partnership, etc.....	312
No. 148.	For account of partnership dealings.....	315
No. 152.	To redeem, by heirs of mortgagor.....	329
No. 153.	To redeem from a deed, intended as a mortgage....	331
No. 154.	To redeem goods pledged as security.....	332
No. 155.	To set aside a decree of foreclosure, to redeem, etc..	333
No. 157.	Of foreclosure.....	350
No. 158.	Of foreclosure, by assignee of mortgage.....	353
No. 159.	Of foreclosure, against executor, etc., of deceased mortgagor.....	355
No. 160.	Of foreclosure against administrator, etc., of deceased mortgagor.....	356
No. 161.	Of foreclosure of deed of trust, etc.....	356
No. 162.	Of foreclosure of a deed, intended as a mortgage....	358
No. 172.	Strict foreclosure.....	386
No. 176.	Of creditor's bill.....	408
No. 177.	Of creditor, in aid of execution.....	413
No. 178.	By creditor v. executor, etc.....	415
No. 183.	For partition between heirs, subject to dower.....	431
No. 184.	For partition, etc.....	432
No. 185.	For partition and dower.....	434
No. 193.	For probate of foreign will.....	457
No. 194.	For divorce, for impotency, etc.....	470
No. 195.	For divorce, by husband, for adultery.....	475
No. 196.	For divorce, by wife, for adultery.....	476
No. 197.	For divorce, charging conviction of crime.....	478
No. 198.	For divorce, charging desertion.....	481
No. 199.	For divorce, for drunkenness.....	483
No. 200.	For divorce, for extreme cruelty.....	489
No. 201.	For divorce and injunction, for cruelty, etc.....	490
No. 202.	For divorce, for failure to support.....	493
No. 222.	For separate maintenance.....	532
No. 226.	To quiet title and cancel deed.....	549
No. 227.	To quiet title, and set aside tax deed.....	551
No. 228.	To quiet title, and set aside contract of sale, etc....	552
No. 230.	For <i>ne exeat</i>	556
No. 233.	To remove trustees, etc.....	563
No. 234.	For appointment of new trustees, etc.....	565
No. 235.	To restrain waste, etc.....	570

BILLS IN CHANCERY—Continued.

No. 236.	By surety, for subrogation, etc.....	580
No. 237.	To set aside judgment, etc.....	593
No. 238.	By sureties on replevin bond, for relief, etc.....	595
No. 239.	To correct mistakes in deed.....	601
No. 240.	For a vendor's lien.....	610
No. 261.	To bar dower of insane wife.....	660
No. 264.	To enforce contribution.....	678

BOND FOR COSTS—

No. 1.	Form of.....	9
--------	--------------	---

BOOKS AND WRITINGS—

No. 321.	Form of notice to produce.....	795
----------	--------------------------------	-----

BRIEF AND POINTS—*Form of.*

No. 314.	Brief and points at hearing.....	793
----------	----------------------------------	-----

CAPTION—

No. 97.	Form of, for orders and decrees.....	179
---------	--------------------------------------	-----

CERTIFICATE OF COUNSEL—

No. 24.	Form of, that demurrer is well founded, etc.....	75
No. 32.	Form of, that plea is well founded.....	86
No. 316.	Of counsel when stay of proceedings is desired on filing cross-bill.....	794

CIRCUIT COURT COMMISSIONERS —(See COMMISSIONERS, CIRCUIT COURT.)**CLOUD ON TITLE—**

No. 226.	Form of bill to cancel deed.....	541
No. 227.	Same, to set aside tax deed.....	55
No. 228.	Same, to set aside contract, etc.....	55
No. 229.	Decree to remove	55

COMMISSION—*Form of.*

No. 89.	Of petition for issuance of, to take testimony in chancery cause.....	10
No. 91.	Notice of application for.....	16
No. 92.	The commission.....	16

COMMISSIONERS—(See PARTITION SUITS.)**COMMISSIONERS, CIRCUIT COURT—***Forms.*

No. 79.	Notice to, of order closing proof.....	13
No. 83a.	Certificate of, on filing proofs.....	14
No. 83.	Proof taken before.....	14
No. 84.	Order of reference to take proof.....	14
No. 85.	Report of testimony taken by.....	14
No. 86.	Objections to report of.....	14
No. 87.	Exceptions to report of.....	14
No. 98.	Caption of order by.....	17
No. 166.	Of notice of chancery sale, by.....	37
No. 168.	Report of sale, by.....	37
No. 171.	Deed upon sale.....	37
No. 218.	Report of evidence, and allowance of alimony.....	52

COMMISSIONERS, CIRCUIT COURT—*Continued.*

No. 231.	Of allowance of <i>ne exeat</i>	557
No. 243.	Notice of application for injunction to.....	622
No. 244.	Order for injunction by.....	622
No. 246.	Indorsement of refusal to grant injunction.....	623

CONTEMPTS—

Form of.

No. 211.	Demand for temporary alimony.....	518
No. 212.	Order to show cause why attachment should not issue.....	519
No. 213.	Attachment writ.....	520
No. 214.	Return of sheriff to attachment.....	520
No. 215.	Interrogatories in proceedings for.....	521
No. 216.	Answer to.....	521
No. 262.	Affidavit in support of.....	670
No. 263.	Order for attachment.....	671
No. 281.	Order, when defendant admits contempt, that he answer within specified time.....	782
No. 282.	For commitment, for disobeying order to answer...	783
No. 285.	Order directing filing of interrogatories.....	783
No. 286.	Order of conviction, after examination.....	784
No. 289.	Order for sequestration.....	786

CONTRACTS—

No. 228.	Bill to set aside, as cloud on title.....	552
----------	---	-----

CONTRIBUTION—

No. 264.	Form of bill to enforce.....	676
----------	------------------------------	-----

COSTS—(See BOND FOR COSTS.)

COVERTURE—

No. 37.	Form of plea of.....	88
---------	----------------------	----

CREDITOR'S BILL—

Forms of.

No. 176.	Bill, general.....	408
No. 177.	In aid of execution, etc.....	413
No. 178.	Against executrix, etc.....	415
No. 179.	Order appointing receiver in.....	418
No. 180.	Order of reference, etc.....	419
No. 181.	Decree for payment, etc.....	419
No. 182.	Decree setting aside fraudulent conveyance in aid of execution.....	420
No. 175.	Consent that bill be taken as confessed.....	405
No. 326.	Petition of judgment creditor to be made a party to.	797
No. 327.	Order making, etc.....	798

CRIME—

No. 197.	Form of bill for divorce, on conviction of.....	478
----------	---	-----

CROSS-BILLS—

Forms of.

No. 137.	To a foreclosure suit.....	275
No. 138.	In nature of plea <i>puis darrein</i> continuance.....	277

CRUELTY—

Form of.

- No. 200. Of bill for divorce, on that charge, by husband..... 489
 No. 201. Same, by wife, and for injunction..... 490
 No. 206. Of decree for divorce for..... 511

DECREE—

- No. 113. Form of bill to carry into execution..... 212

DECREES AND ORDERS—

Forms of Orders.

- No. 10. Of appearance or publication..... 50
 No. 284. For attachment for not answering..... 783
 No. 18. *Pro confesso*, and of reference..... 57
 No. 21. Setting aside default and decree..... 61
 No. 43. Of reference, on plea of former adjudication..... 90
 No. 312. To expunge scandal and impertinence..... 792
 No. 322. To take proofs..... 736
 No. 325. Closing proofs..... 736
 No. 82. Enlarging time to take proofs..... 140
 No. 84. Reference to commissioner to take proofs..... 147
 No. 94. Directing issue of fact to be tried by a jury..... 168
 No. 100. General form of order..... 183
 No. 97. Caption of, by judge..... 179
 No. 98. Caption of, by commissioner..... 179
 No. 99. Recital of..... 180
 No. 101. General form of..... 184
 No. 102. Same, or order..... 184
 No. 116. For revivor..... 219
 No. 118. Substituting assignee of note as complainant..... 221
 No. 133. For injunction on bill of interpleader..... 260
 No. 143. For reference as to title, etc..... 304
 No. 144. For account in specific performance..... 305
 No. 145. For specific performance..... 305
 No. 149. Appointing receiver in partnership suit..... 316
 No. 150. For account of partnership dealings..... 317
 No. 151. Final, for dissolution of partnership..... 317
 No. 156. For redemption..... 326
 No. 164. *Pro confesso* and reference in foreclosure suit..... 361
 No. 165. Foreclosure and sale, *pro confesso*..... 368
 No. 169. Confirming sale in foreclosure suit..... 377
 No. 173. Foreclosure and sale on hearing..... 388
 No. 174. Of strict foreclosure..... 388
 No. 179. Appointing receiver in creditor's suit..... 418
 No. 180. Reference to master in creditor's suit..... 419
 No. 181. Final, on creditor's bill, etc..... 419
 No. 182. Setting aside fraudulent conveyance in aid of execution..... 420
 No. 186. For partition..... 451
 No. 190. Confirming report of commissioners making partition..... 453

DECREES AND ORDERS—*Continued.*

No. 191.	Decree of sale in partition suits.....	454
No. 203.	Directing issue of fact to be tried by jury in divorce suit.....	503
No. 204.	For divorce, <i>pro confesso</i> , with custody of children..	510
No. 205.	For divorce on pleadings and proofs.....	510
No. 206.	For divorce, on verdict of jury, etc.....	511
No. 210.	For temporary alimony.....	517
No. 212.	To show cause for not paying alimony.....	519
No. 217.	Of reference as to alimony, <i>pendente lite</i>	522
No. 219.	Confirming commissioner's allowance of	523
No. 220.	For alimony, <i>pendente lite</i>	523
No. 231.	For permanent alimony	527
No. 234.	For separate maintenance.....	537
No. 239.	To quiet title, etc.....	554
No. 300.	Of dismissing bill at hearing.....	789
No. 231.	Allowing <i>ne exeat</i>	557
No. 253.	Appointing next friend of infant.....	629
No. 256.	Appointing guardian <i>ad litem</i>	632
No. 258.	Same, on petition of complainant.....	633
No. 259.	Making appointment absolute.....	633
No. 263.	Attachment for contempt.....	671
No. 244.	For injunction, by circuit judge.....	622
No. 245.	Same, by circuit court commissioner.	622
No. 246.	Refusal to grant, by commissioner.....	623
No. 249.	Dissolving injunction.....	626
No. 277.	Affirming decree in chancery.....	740
No. 278.	Reversing decree in chancery.....	740
No. 281.	That defendant admitting contempt, answer.....	782
No. 282.	For commitment for disobeying order to answer....	783
No. 285.	Directing filing of interrogatories in contempt, etc..	783
No. 286.	Convicting of contempt after examination.....	784
No. 287.	To refer second or third answer on old exceptions...	785
No. 288.	For sheriff acting as sergeant-at-arms.....	785
No. 289.	For a sequestration.....	786
No. 290.	Reference, defendant not submitting to answer exceptions	786
No. 291.	For further answer, etc.....	786
No. 292.	For attachment, third answer insufficient.....	787
No. 293.	For examination of defendant on interrogatories, etc.....	787
No. 294.	Leave to amend bill after plea to part is allowed....	787
No. 271.	Extending time for return.....	724
No. 295.	Of reference to commissioner.....	787
No. 296.	Reference of plea of former suit pending.....	788
No. 297.	Directing plea to stand for answer.....	788
No. 298.	Allowing complainant to dismiss his bill.....	788
No. 299.	To pay money into court.....	788
No. 301.	Cause stand over to add new parties.....	739
No. 302.	To supply proofs.....	789

DECREES AND ORDERS—*Continued.*

- No. 317. To stay proceedings in original suit. 794
 No. 327. Making judgment creditor a party to creditor's bill. . 798

DEEDS, ETC.—

Form of.

- No. 239. Of bill to correct mistakes in, etc. 601
 No. 152. Of bill to redeem from, when intended as a mortgage. 331
 No. 162. Of bill to foreclose, when given as a mortgage. 358
 No. 226. To cancel, etc. 549
 No. 229. Decree to cancel, etc. 554

DEEDS OF TRUST—

- No. 161. Form of bill to foreclose. 356

DEFAULT—(See TAKING BILLS AS CONFESSED.)

DEMURRER—

Forms of.

- No. 23. General frame of. 74
 No. 24. Certificate of counsel. 74
 No. 25. For multifariousness. 78
 No. 26. For want of parties. 79
 No. 27. For want of privity. 79
 No. 28. To bill of discovery. 79
 No. 29. Complainant shows no interest. 80
 No. 30. To part of bill. 80
 No. 31. To part of bill, with answer to the residue. 80
 No. 109. To supplemental bill. 203
 No. 128. To a bill of review. 247
 No. 130. To bill of interpleader, for want of affidavit of non-collusion. 258
 No. 131. Same, showing no right in defendant. 259
 No. 132. Same, showing no right in complainant. 259

DEPOSITIONS—

Forms of.

- No. 88. Notice to take 159
 No. 89. Petition that commission issue. 160
 No. 90. Notice and interrogatories to take in writing. 160
 No. 91. Notice of application for commission. 161
 No. 92. Commission to take. 161

DESERTION—

- No. 198. Form of bill for divorce for. 481

DISCLAIMER—

- No. 72. Form of, to bill 120
 No. 73. Answer and. 120

DIVORCE, BILLS FOR—

Forms of.

- No. 194. On the ground of impotency. 470
 No. 195. Affidavit to bill and of non-collusion. 471
 No. 195a. Charging adultery, by husband. 475
 No. 196. Adultery, by wife. etc. 476
 No. 197. Charging conviction of crime. 478

DIVORCE, BILLS FOR—*Continued.*

No. 198. Charging desertion.....	481
No. 199. Charging habitual drunkenness.....	483
No. 200. Charging extreme cruelty, etc.....	489
No. 201. Same, and for injunction, etc.....	490
No. 202. For failure to support.....	493
No. 203. Directing issues of fact to be tried by a jury in divorce suit.....	503

Form of decree.

No. 204. <i>Pro confesso</i> , with custody of children.....	510
No. 205. Upon pleadings and proof.....	510
No. 206. For cruelty on verdict of a jury.....	511

(See ALIMONY.)

DOWER—

No. 185. Form of bill for partition and dower.....	434
No. 261. Form of petition to bar, of insane wife.....	660

DRUNKENNESS, HABITUAL—

No. 199. Form of bill for divorce, on that ground.....	483
--	-----

ERRORS, ASSIGNMENT OF—

No. 274. Form of.....	731
-----------------------	-----

Form of pleas to.

No. 275. Of release of errors.....	732
No. 276. Of statute of limitations.....	732

EXCEPTIONS—

Forms of.

No. 310. To answer, for insufficiency.....	791
No. 311. Same, for scandal and impertinence.....	792
No. 308. To commissioners' report, etc.....	791

FEIGNED ISSUES—TRIAL BY JURY—

No. 94. Form of order directing an issue of fact to be tried by a jury.....	163
No. 203. Same, in divorce suit.....	503

FELONY, CONVICTION OF—

No. 197. Form of bill for divorce on that ground.....	478
---	-----

FORECLOSURE OF MORTGAGES—

Forms in proceedings for.

No. 74. Form of answer to bill of foreclosure praying affirma- tive relief.....	123
No. 137. Cross-bill to foreclosure suit.....	275
No. 152. Bill to set aside a decree of foreclosure, by heirs, etc., and to redeem.....	329
No. 157. Of mortgagee against mortgagor.....	350
No. 158. By assignee of mortgage.....	353
No. 159. Mortgagee v. executor, etc., of mortgagor.....	355
No. 160. Same, against administrator, etc.....	356
No. 161. To foreclose deed of trust.....	356
No. 162. To foreclose deed absolute on its face, intended as a mortgage.....	358
No. 172. For a strict foreclosure.....	383
No. 163. Notice <i>lis pendens</i>	360

FORECLOSURE OF MORTGAGES—Continued.

No. 164.	Order <i>pro confesso</i> , and reference.....	361
No. 165.	Decree of, and sale, <i>pro confesso</i>	368
No. 166.	Notice of sale.....	372
No. 167.	Certificate of enrollment.....	373
No. 168.	Commissioner's report of sale.....	374
No. 169.	Order confirming sale.....	377
No. 170.	Affidavit of posting notices.....	377
No. 171.	Commissioner's deed.....	377
No. 173.	Form of decree upon the hearing.....	388
No. 174.	Of decree of strict foreclosure.....	388

FORMER ADJUDICATION—

No. 42.	Form of a plea of.....	89
No. 43.	Form of order of reference upon.....	90

FORMER SUIT PENDING—

No. 44.	Form of plea of.....	91
---------	----------------------	----

GUARDIAN AD LITEM—(See PROCEEDINGS BY AND AGAINST INFANTS.)

HABITUAL DRUNKENNESS—

No. 199.	Bill for divorce, charging.....	488
----------	---------------------------------	-----

HEARING—

No. 95.	Form of notice of.....	171
No. 96.	Note of issue.....	172
No. 314.	Form of brief and points on.....	793

IMPERTINENCE—

No. 311.	Same, to answer for.....	792
No. 312.	Form of order expunging, etc.....	792

IMPOTENCY—

No. 194.	Form of bill for divorce on that ground.....	470
----------	--	-----

INFANCY—

No. 38.	Form of plea of, without a <i>prochein ami</i>	88
---------	--	----

INFANTS, PROCEEDINGS BY, AND AGAINST—

Forms for.

No. 250.	Petition for appointment of next friend.....	628
No. 251.	Consent to become next friend.....	628
No. 252.	Acknowledgment of.....	628
No. 253.	Order appointing next friend.....	629
No. 254.	Petition by infant for guardian <i>ad litem</i>	631
No. 255.	Form of affidavit of infant's signature.....	632
No. 256.	Order appointing guardian <i>ad litem</i> on petition of infant.....	632
No. 257.	Petition of complainant for appointment of guardian <i>ad litem</i>	632
No. 258.	Order upon same.....	633
No. 259.	Order making appointment of guardian <i>ad litem</i> absolute.....	
No. 260.	Petition by relative of an infant for appointment of guardian <i>ad litem</i>	
No. 69.	Answer of, by guardian <i>ad litem</i>	115

INJUNCTION—

Forms in proceedings for.

No. 241.	Notice of application to judge for.....	651
No. 242.	Affidavit of judge's absence, etc.....	651
No. 243.	Notice of application to commissioner.....	652
No. 244.	Order of circuit judge, granting.....	652
No. 245.	Order of commissioner, granting.....	652
No. 246.	Indorsement of refusal to grant, etc.....	623
No. 247.	Notice of motion to dissolve.....	625
No. 248.	Motion to dissolve.....	625
No. 249.	Order dissolving.....	626
	Prayer for.....	39

INSUFFICIENCY—

No. 310.	Form of exception to answer for.....	791
----------	--------------------------------------	-----

INTERPLEADER, BILL FOR—

Forms for.

No. 129.	Bill for.....	256
No. 129a.	Affidavit to be annexed to.....	257
No. 130.	Demurrer to, for want of affidavit of non-collusion..	258
No. 131.	Same, for not showing any claim in defendant....	259
No. 132.	Same, not showing any right in complainant.....	259
No. 133.	Order for injunction upon.....	260
No. 134.	Interlocutory decree, directing reference, etc.....	263

INTERROGATORIES—

No. 215.	Form of, in proceedings for contempt.....	521
No. 216.	Form of answer to interrogatories.....	521
No. 303.	Same.....	789

JUDGMENT—

No. 237.	Form of bill to set aside, etc.....	593
No. 238.	Bill by sureties for relief, and to set aside, etc.....	595

JURAT.

Form of.

No. 2.	To bill.....	40
No. 104.	To affidavit.....	192
No. 105.	To bill sworn to by solicitor.....	193

JURISDICTION—

No. 36.	Form of plea in abatement, of want of.....	87
---------	--	----

JURY—

No. 94.	Form of order directing issue to be tried by.....	168
No. 203.	Same, in divorce suit.....	503

LANDLORD AND TENANT—

No. 235.	Form of bill, landlord against tenant to restrain waste, etc.....	570
----------	--	-----

LIEN, VENDORS—

No. 240.	Form of bill to enforce.....	610
----------	------------------------------	-----

LIMITATIONS—

No. 45.	Form of plea of statute of.....	92
No. 276.	Same to a writ of error.....	732

MAINTENANCE, SEPARATE—

No. 222.	Form of bill for.....	532
----------	-----------------------	-----

MAINTENANCE, SEPARATE—*Continued.*

- No. 223. Form of commissioner's report as to the evidence
and allowance..... 535
No. 224. Form of decree for..... 537

MAINTENANCE, SUITS FOR—

- No. 225. Form of petition for..... 540

MISTAKES—

- No. 239. Form of bill to correct, in a deed..... 610

MORTGAGES—(See FORECLOSURE OF MORTGAGES, BILLS TO REDEEM.)

MOTIONS—

- No. 103. Form of notice of special motion..... 188
No. 273. Form of, to dismiss writ of error..... 727
No. 248. Form of, to dissolve injunction..... 625

MULTIFARIOUSNESS—

- No. 25. Form of demurrer on that ground..... 78

NE EXEAT—

- No. 230. Form of prayer for..... 556
No. 231. Form of allowance, by circuit judge..... 557
No. 232. By circuit court commissioner..... 232

NEXT FRIEND—(See INFANTS.)

NON-COLLUSION—

- No. 195. Affidavit of, in divorce suit..... 471
No. 129a. Affidavit to bill of interpleader..... 257

NOTICE—

- No. 13. Form of notice of appearance. 54
No. 95. Form of, of hearing in Circuit Court..... 171
No. 103. Form of notice of special motion..... 188
No. 267. Of application for approval of bond..... 719
No. 268. Of appeal..... 720
No. 272. Of extension of time for making returns..... 724

NUNC PRO TUNC CLAUSE—

- Form of, in decree..... 182

OATH—

- No. 2. Form of, to bill or petition..... 40

OBJECTIONS—

- No. 86. To commissioner's report..... 148

ORDERS—(See DECREES AND ORDERS.)

PARTIES—

- No. 26. Form of demurrer, for want of..... 79
No. 47. Form of plea of want of..... 88

PARTITION SUITS—

Forms in.

- No. 183. Bill for, between heirs, subject to dower..... 431
No. 184. Of bill for..... 432
No. 185. Of bill for petition and dower..... 434
No. 186. Of decree for..... 451
No. 187. Report of commissioners, making, etc..... 451
No. 188. Of oath to commissioners..... 452
No. 189. Report of commissioners, that premises are not sus-
ceptible of division..... 452

PARTITION SUITS—*Continued.*

No. 190.	Decree confirming report of commissioners.....	453
No. 191.	Decree for sale of premises.....	454
No. 192.	Decree confirming sale in partition.....	454

PARTNERSHIP MATTERS, BILLS RELATING TO—

No. 146.	Form of bill, for dissolution, etc.....	312
No. 147.	Form of affidavit to, for injunction.....	314
No. 148.	Form of bill, for an account, etc.....	315
No. 149.	Form of order appointing receiver in.....	316
No. 150.	Form of decree for an account, etc.....	317
No. 151.	Form of decree, for dissolution, etc.....	317

PETITIONS—

Forms of.

No. 22.	To set aside decree by defendant not personally notified	64
No. 75.	For leave to amend bill after replication.....	130
No. 108.	For leave to file supplemental bill.....	201
No. 117.	Petition for substitution of assignee as party complainant.....	220
No. 121.	For leave to file bill of review for errors of law.....	238
No. 122.	Same, upon discovery of new matter.....	239
No. 123.	Order for leave to file bill of review.....	240
No. 207.	For alimony, <i>pendente lite</i> , etc.....	514
No. 225.	For support and maintenance.....	540
No. 250.	By infant, for appointment of next friend.....	628
No. 254.	By infant for appointment of guardian <i>ad litem</i>	631
No. 257.	Same, by complainant.....	632
No. 260.	Same, by a relative.....	637
No. 261.	To bar dower of insane wife.....	660

PLEAS TO BILLS—

Forms of.

No. 34.	Commencement and conclusions of.....	87
No. 35.	Same, to part of bill.....	87
No. 36.	To the jurisdiction of the court.....	87
No. 37.	Of coverture of complainant.....	88
No. 38.	Of infancy without <i>prochein ami</i>	88
No. 39.	That defendant never was administrator.....	88
No. 40.	Alien enemy.....	88
No. 41.	Want of proper parties.....	89
No. 42.	Former adjudication.....	89
No. 44.	Former suit pending.....	91
No. 45.	Statute of limitations, in Circuit Court.....	92
No. 276.	Same, to writ of error.....	732
No. 275.	Release of errors in Supreme Court.....	732
No. 46.	Of release, supported by answer.....	92
No. 47.	Of stated account.....	93
No. 48.	To part, and answer to residue of bill.....	94
No. 110.	To a supplemental bill.....	204
No. 127.	To a bill of review.....	247

PRACTICE IN THE SUPREME COURT—

Forms in.

No. 265.	Claim of appeal.....	718
No. 266.	Bond on appeal.....	719
No. 267.	Notice of application for approval of bond.....	719
No. 268.	Notice of appeal	720
No. 269.	Affidavit of service of notice, etc.....	720
No. 270.	For order to extend time of return.....	724
No. 271.	Order extending time of return.....	724
No. 272.	Notice of extension of time of return.....	724
No. 273.	Motion to dismiss writ of error.....	727
No. 274.	Assignment of errors.....	731
No. 275.	Plea of release of errors.....	732
No. 276.	Plea of statute of limitations.....	732
No. 277.	Order affirming decree.....	740
No. 278.	Order reversing decree.....	740

PRIVITY—

No. 27.	Form of demurrer, for want of.....	79
---------	------------------------------------	----

PROCEEDINGS TO BAR DOWER OF INSANE—

No. 261.	Form of petition to bar dower of insane wife.....	660
----------	---	-----

PROCESS FOR APPEARANCE—

Forms relating to.

No. 114.	Prayer for <i>subpœna</i>	217
No. 3.	Of chancery <i>subpœna</i>	42
No. 4.	Of officer's return.....	45
No. 5.	Of affidavit of service.....	45
No. 6.	Of affidavit for order of appearance, and for publication.....	49
No. 7.	Same, non residence of defendant, place of residence not known.....	49
No. 8.	Same, defendant can not be found.....	49
No. 9.	Same, defendant concealed in the State.....	49
No. 10.	Order of appearance, or publication.....	50
No. 11.	Short form, order of publication.....	50
No. 12.	Of proof of service of order of appearance.....	51
No. 281.	Order where defendant admits contempt, etc., to answer within specified time.....	782
No. 282.	Order for commitment for contempt, disobeying order to answer.....	783
No. 283.	Affidavit to obtain attachment against defendant for not answering.....	783
No. 284.	Order for attachment for not answering.....	783
No. 285.	Order in case of contempt, where defendant denies his contempt, directing filing of interrogatories... ..	783
No. 286.	Order for conviction, etc., after examination on interrogatories	754
No. 287.	Order to refer second or third answer on old exceptions	785
No. 288.	Order for sheriff acting as sergeant-at-arms.....	785
No. 289.	Order for a sequestration.....	786

PROCESS FOR APPEARANCE—*Continued.*

- No. 290. Order of reference, where defendant does not submit to answer exceptions..... 786
- No. 291. Order for further answer after report of commissioner 786
- No. 292. Order for attachment on third answer being held insufficient..... 787
- No. 293. Order for examination of defendant on interrogatories, etc., on third answer being held insufficient. 787

PROCESS—

- Form of prayer of..... 39

PUIS DARREIN CONTINUANCE—

- No. 138. Form of cross-bill in the nature of a plea of..... 277

RECEIVERS—

- No. 149. Form of order appointing in suit between partners.. 316
- No. 179. Same, in a creditor's suit..... 418

REDEEM, BILLS TO—

Forms in.

- No. 152. Bill by heirs of mortgagor to redeem..... 329
- No. 153. Bill to redeem from deed intended as a mortgage... 331
- No. 154. Bill to redeem goods, etc..... 332
- No. 155. Bill to set aside decree, and to redeem, etc..... 333
- No. 156. Decree for redemption..... 336

REDEMPTION—(See REDEEM, BILLS TO.)

REFERENCE—

Form of orders of.

- No. 43. Of reference of plea of former adjudication..... 90
- No. 84. To commissioner to take proofs..... 147
- No. 143. As to title, etc..... 304
- No. 144. For account in specific performance..... 205
- No. 150. For account of partnership dealings..... 317
- No. 164. In foreclosure proceedings..... 361
- No. 180. In creditor's suit..... 419
- No. 217. As to alimony, *pendente lite*..... 522
- No. 287. To refer second or third answer on old exceptions.. 785
- No. 290. On defendant not submitting to answer exceptions.. 786

RELEASE—

- No. 46. Form of plea of, supported by answer..... 92
- No. 275. Form of plea of, to errors assigned..... 732

REPLICATION—

- No. 78. Form of..... 134

REPORTS—

Forms of.

- No. 85. Commissioner's report of testimony..... 147
- No. 187. Of commissioners making partition..... 451
- No. 189. That premises can not be divided..... 452
- No. 218. Of commissioner, as to allowance of alimony..... 522
- No. 223. Of commissioner, as to the evidence and allowance in separate maintenance..... 535

REPORTS—*Continued.*

- No. 305. Of commissioner, upon exceptions to answer for
insufficiency..... 790
- No. 307. Of commissioner as to sufficiency of defendant's
examination 790

RETURN—

- No. 4. Form of, by officer..... 45

REVIEW, BILLS OF—

Forms relating to.

- No. 121. Of petition for leave to file, etc..... 238
- No. 122. Same, upon newly-discovered matter..... 239
- No. 123. Of order for leave to file..... 240
- No. 124. Of bill of, upon error in law..... 242
- No. 125. Same, on discovery of new matter..... 242
- No. 126. Of affidavit to a bill of, on discovery of new matter. 243
- No. 127. Of plea to..... 247
- No. 128. Of demurrer to..... 247

REVIVOR, BILLS OF—

Forms relating to.

- No. 114. Of bill, before decree..... 217
- No. 115. Same, after decree, etc..... 218
- No. 116. Of order for revivor..... 219

REVIVOR, BILLS IN THE NATURE OF—

- No. 119. Form of bill, etc..... 224

REVIVOR AND SUPPLEMENT, BILLS OF—

- No. 120. Form of bill of..... 227

SCANDAL AND IMPERTINENCE—

- No. 311. Form of exceptions to answer for..... 792
- No. 312. Form of order to expunge..... 792

SEPARATE MAINTENANCE—(See MAINTENANCE, SEPARATE.)

SERVICE—

- No. 4. Form of officer's return of..... 45
- No. 5. Form of affidavit of..... 45

SEQUESTRATION—

- No. 233. Form of order for..... 736

SERGEANT-AT-ARMS—

- No. 288. Form of order appointing..... 785

SPECIFIC PERFORMANCE, BILLS FOR—

Forms relating to.

- No. 139. Of bill for, of a written agreement, vendee v. vendor 298
- No. 140. Same, vendor v. vendee..... 299
- No. 141. Same, on a bond for deed, vendee v. legal representa-
tives of vendor..... 300
- No. 142. Same, by lessee v. lessor, on written agreement for
a lease..... 301
- No. 143. Of order for reference as to title, etc..... 304
- No. 144. Of interlocutory decree for an account..... 305
- No. 145. Of final decree for performance..... 205

STATUTE OF FRAUDS—

- No. 70. Form of answer setting it up..... 116

SUBPŒNA—

- No. 3. Form of, in chancery..... 42
 No. 4. Return of officer of service of..... 45

SUBROGATION—

- No. 236. Form of bill, by surety to be subrogated, etc..... 580

SUITS FOR MAINTENANCE—(See MAINTENANCE.)

SUPPLEMENTAL BILLS—

Forms in relation to.

- No. 106. Bill for specific performance, etc..... 199
 No. 107. Same, assignee in bankruptcy, etc..... 200
 No. 108. Of petition for leave to file..... 201
 No. 109. Of demurrer to..... 203
 No. 110. Of plea to..... 204

BILLS IN THE NATURE OF—

- No. 112. Form of..... 209
 No. 113. Form of, to carry decree into execution..... 212

TAKING BILLS AS CONFESSED—

Forms relating to.

- No. 13. Of notice of appearance..... 54
 No. 14. Of affidavit of failure of complainant to serve copy
 of bill..... 55
 No. 15. Of affidavit of non-appearance..... 56
 No. 16. Of affidavit on default..... 56
 No. 17. Of affidavit of regularity..... 57
 No. 18. Of order *pro confesso*, and reference..... 57
 No. 19. Of commissioner's report, etc..... 58
 No. 20. Of affidavit in support of motion to set aside default. 61
 No. 22. Of petition to set aside decree, etc..... 64

TAX DEED—

- No. 227. Form of bill to set aside, etc..... 551

TESTIMONY—(See DEPOSITIONS.)

Forms relating to.

- No. 79. Of notice to commissioner of order closing proofs... 139
 No. 80. Of notice to solicitor of order, etc..... 139
 No. 81. Of notice of examination of witnesses..... 139
 No. 82. Of order enlarging time to take proofs..... 140
 No. 83. Of proofs taken before commissioner..... 143
 No. 83a. Of certificate of commissioner on filing proofs..... 144
 No. 89. Of petition to register that commission issue..... 160
 No. 91. Of notice of application for commission..... 161
 No. 92. Of commission to take, etc..... 161
 No. 83. Of caption..... 143
 No. 84. Of order of reference to commissioner to take proof. 147
 No. 85. Of commissioner's report of..... 147
 No. 86. Of objections to commissioner's report..... 148
 No. 87. Of exceptions to commissioner's report..... 148
 No. 88. Notice to take deposition..... 159
 No. 89. Petition to register that commission issue..... 160
 No. 90. Notice and interrogatories for taking depositions
 upon interrogatories in writing..... 160

TESTIMONY—*Continued.*

No. 91.	Notice of application for commission.....	161
No. 92.	Commission to take testimony.....	161
No. 93.	Notice to produce written instrument on trial....	163
No. 321.	Notice to produce books, etc.....	795
No. 322.	Of order to take proof.....	796
No. 323.	Of notice of order to take proof.....	796
No. 324.	Of affidavit for order to close proofs.....	796
No. 325.	Of order closing proofs.....	796

TITLE, BILLS TO QUIET—

Forms relating to.

No. 226.	Of bill to, and cancel deed.....	549
No. 227.	Of same, to set aside tax deed.....	551
No. 228.	Same, to set aside contract of sale.....	552
No. 229.	Of decree to set aside and cancel deed.....	554

TRUSTS, BILLS RELATING TO—

No. 233.	Form of bill to remove trustee, etc.....	563
No. 234.	Form of bill to secure new trustee, etc.....	565

VENDOR'S LIEN—

No. 240.	Form of bill to enforce.....	610
----------	------------------------------	-----

WASTE, BILLS TO RESTRAIN—

No. 235.	Form of bill, landlord v. tenant, etc.....	570
----------	--	-----

WILLS, FOREIGN—

No. 193.	Form of bill to probate.....	457
----------	------------------------------	-----

WRIT OF ERROR—(See PRACTICE IN THE SUPREME COURT.)

